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CURRENT TOPICS

Sir Hugh Matheson Foster

SIR HUGH MATHESON FOSTER, T.D., President of The Law Society in 1945–46, died at his home near Aldershot on 10th February, at the age of sixty-nine. He was the son of Sir William Edward Foster. Educated at Wellington College, he was admitted in 1907 and entered the family firm of Foster, Wells and Coggins, of Aldershot, of which he became in due course senior partner. During the Great War he served as a major with the 4th Battalion, the Hampshire Regiment, and then as D.A.A.G. with the 4th (Indian) Division in Mesopotamia. He was coroner for the Aldershot Division of Hampshire and was elected President of the Hampshire Law Society in 1921 and Mayor of Aldershot for 1927–29. He was knighted in 1946.

Capital Punishment

WHETHER it is a good thing or not that there should be more than two views on a subject, or almost as many views as people, it is undeniably a good thing that the law about it should not suffer from uncertainty or ill-considered or unduly rapid changes. This seemed to be the theme behind the Government's motion moved by the HOME SECRETARY and agreed to in the Commons on 10th February " that this House takes note of the Report of the Royal Commission on Capital Punishment." For example, the Government, provisionally and subject to debate, agreed with the minority of the Commission's members that it was not advisable to raise the age limit from eighteen to twenty-one for receiving the death sentence, particularly in view of the fact that between 1938 and 1953 the number of persons between seventeen and twenty-one convicted of crimes of violence had risen from 163 to 603. Again, the Government recognised that the McNaghten rules were open to criticism but thought, in view of differences of opinion among doctors, lawyers and the general public on the subject, that it was better to leave matters as they were. The Government also held the view that capital punishment should not be abolished or suspended, as it was a unique deterrent, and the Government were not convinced that public opinion was in favour of abolition, and believed the contrary to be true. On the other hand the Commission's recommendation had been accepted, that the mental state of every prisoner charged with murder should be examined by two doctors, of whom one at least should be an outside psychiatrist and the other usually an experienced member of the prison service. The Home Secretary said that this was now the practice, and where there was any reason to believe that any question of difficulty was likely to arise with regard to the mental state of the accused, a psychiatrist from outside the prison service was consulted.

Extension of Legal Aid and Advice

COST, in terms of both finance and administrative endeavour, was the argument used by the SOLICITOR-GENERAL in the Commons on 10th February to support his thesis that the Government were doing all that could be reasonably hoped

CONTENTS

for in the implementation of the Legal Aid and Advice Act. Answering Mr. BARNETT JANNER on the adjournment, he said that it was hoped—he was not giving any pledge—to make legal aid available in the county courts by the time those courts got their extended jurisdiction. The administration of those two operations constituted "a large labour," and it would be unreasonable to throw at the same time on The Law Society and, indeed, on public funds, the burden of providing legal advice, of the cost of which nobody had yet made any very accurate estimate, though £1 million a year had been mentioned. Extension of legal aid to magistrates' and other courts would certainly cost another £1 million a year, and the Government could not see their way to that at present, either. He agreed that the contribution asked of assisted persons was sometimes too high, and he offered to have individual cases investigated, but even letting off the contribution to the tune of £10 a case would cost, at present, about £100,000, and the more legal aid cost the less it could be extended.

Solicitors and Estate Agents

A RARE example of muddled thinking occurred in a speech on 3rd February by Mr. W. FERNIE GREAVES, President of the Sheffield Property Owners' Protection Association, when he said that solicitors should undertake not to do anything that should be done by estate agents. They had, he hesitated to say, enemies in that august body, the solicitors, those who occasionally practised as estate agents, and he added that he knew of many who boasted that they ran their own estate departments in their offices. We venture to submit that the correct view is that estate agents and others not qualified as lawyers are forbidden by Act of Parliament to draw certain instruments in writing, just as persons unqualified as dentists are forbidden by Act of Parliament to draw teeth. Until the profession of estate agents is sufficiently defined and similarly protected, estate agents can have no claim on either legal or moral grounds to protection for any "exclusive territory."

Estate Duty on Private Companies

IN further explanation of an interpretation placed by the Estate Duty Office on a statement by him in 1953, the ECONOMIC SECRETARY TO THE TREASURY has written a letter to the Council of The Law Society, published in the current issue of the *Law Society's Gazette*. The essence of the interpretation was that negative goodwill had no application to a valuation of a company's assets on a "break-up" basis. The Economic Secretary wrote that negative goodwill could only apply in the case of someone buying a business and could not apply to someone merely buying its assets. A buyer in the open market would buy the assets after deduction of negative goodwill only if he were buying them as the assets of that particular company. He added that he understood that, in the great majority of cases, valuation is on the going concern basis, and where it is on the break-up basis he could see no justification in the legislation for assuming that the assets are to be valued on any other basis than that of the price they would fetch if a break-up sale actually took place. The Council are considering whether to make any further representations for the alteration of the practice of the Estate Duty Office. They are not in the position to quote any cases in which the present practice has been the cause of hardship. Solicitors with experience of such cases are asked to send details of them to the Secretary at The Law Society's Hall, Chancery Lane, W.C.2, as soon as possible.

Maintenance Payments and Income Tax

THE Council of The Law Society state in the February issue of the *Law Society's Gazette* that they believe that many wives, entitled under maintenance orders made by the High Court, must suffer hardship by reason of the need to claim and recover income tax which they are not liable to bear, and that it may well be that evidence of hardship is within the knowledge of solicitors. Any solicitors with knowledge of such cases are invited to send particulars to the Secretary at The Law Society's Hall, Chancery Lane, W.C.2, so that this evidence may be communicated confidentially to the Chancellor of the Exchequer. The Council point out that income tax at the standard rate is deducted from maintenance payments made in the High Court unless the weekly amount does not exceed £2 for a wife and £1 for a child, although the corresponding amounts under orders made by magistrates are £5 and £1 10s. respectively

Compulsory Registration: A Yorkshire View

THE Yorkshire County Association of Building Societies recently suggested to the Bradford City Council that compulsory registration of land titles would reduce the legal costs of persons buying houses. The Bradford Finance Accounts Sub-Committee heard evidence from authorities which had introduced the system and from others, and came to the conclusion that, although it had advantages over the present system of conveyancing, and in time would probably replace it, it was not opportune to introduce such a scheme at present. Legal costs would be reduced, it was felt, only after registration had become well established, and at first the cost of registration would be added. It was also pointed out that the mortgage guarantee scheme was proving successful in Bradford, and any increase in legal costs because of registration would have an adverse effect on many individuals.

The Children and Young Persons (Harmful Publications) Bill

THE works to which the Government's "horror comics" Bill, introduced and read a first time in the Commons on 10th February, applies are any book, magazine, or like work which consists wholly or mainly of stories told in pictures, with or without the addition of written matter, portraying the commission of crimes, acts of violence or cruelty, or incidents of a repulsive or horrible nature in such a way that the work as a whole would tend to corrupt a child or young person by inciting or encouraging him to commit crimes or acts of violence or cruelty, or in any other way. It proposes to make it an offence to print, publish, or sell such "pictorial publications harmful to children and young persons," and the maximum penalty on summary conviction would be four months' imprisonment or a fine of £100, or both. It would also be an offence to import these publications or plates or films prepared for producing them. The Bill provides for the granting of search warrants after proceedings are started, and for orders for forfeiture on conviction. It extends, with the necessary modifications, to Scotland, but not to Northern Ireland, and it is proposed that it shall come into operation a month after it has been passed. This evidence of a serious intention on the Government's part to deal with an evil trade is much to be welcomed, even if, as one commentator has observed, the courts will be presented with a formidable task of discrimination.

COUNTY COURT JURISDICTION: THE NEW PROPOSALS

A SIGNIFICANT part of the Interim Report of the Evershed Committee on Supreme Court Practice and Procedure (August, 1949: Cmd. 7764) was devoted to a consideration of the jurisdiction of county courts. The committee recommended that the ordinary jurisdiction of the county court in respect of claims in contract and tort should be increased from the present limit of £200 to £300, with (i) the abrogation of the defendant's present right to have an action transferred to the High Court where the claim exceeds £100, and (ii) the application of sanctions relating to costs "compelling or inducing litigants to resort to the county court" when the claim fell within its jurisdiction. The committee's report also included recommendations for an extension of the jurisdiction of county courts in Admiralty and contentious probate matters.

It is the main purpose of the new County Courts Bill, introduced in the House of Lords on 8th February by the Lord Chancellor, to give effect to the committee's proposal that the county court's jurisdiction should be extended, but the suggested limits are, in general, higher than the committee recommended.

Clause 7 of the Bill provides for the commencement of the Act on a date to be appointed by order of the Lord Chancellor.

General extension of jurisdiction

By cl. 1 (1) of the Bill, it is proposed that the court's jurisdiction in actions of contract or tort, or for money recoverable by statute, shall be increased to £400, as compared with the £300 suggested by the Evershed Committee; and that s. 16 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, shall cease to have effect, which will prevent a defendant from removing to the High Court as of right any action in which the claim exceeds £100.

It will still be open to defendants in certain actions to raise an objection to trial in the county court. Under an amended s. 44 of the County Courts Act, 1934, this will be possible when the claim—whether founded on contract or in tort, the existing different treatment being discontinued—exceeds £40 (instead of £20 on contract, or £10 in tort), if (i) the defendant gives security approved by the registrar for the amount claimed and costs of trial in the High Court, not exceeding a total of £450; and (ii) the judge certifies that in his opinion some important question of law or fact is likely to arise.

A plaintiff will be entitled, as at present, to abandon any part of his claim which exceeds £400 to bring himself within the proposed new limit (Sched. I, Pt. I, para. 2).

The £400 limit is also substituted for the £100 which appeared in the County Courts Act, 1934, in respect of the following matters:—

(*a*) section 45 (2)—transfer of actions from the High Court;

(*b*) section 77—actions by infants for wages; and

(*c*) section 138—transfer from the High Court for the enforcement of judgments against partners.

It is further proposed that the £400 limit may at some future time be raised to £500 by Order in Council, but no recommendation therefor is to be made unless "a draft of the Order has been laid before Parliament and approved by resolution of each House of Parliament" (cl. 1 (4)). If this happens, the limit of the security mentioned in s. 44 will rise to £550.

Sanctions

The familiar pattern of s. 47 (1) and (4) of the County Courts Act, 1934, is proposed to be radically changed, obviously in order to discourage litigants still proceeding in the High Court when they could do so in the county court with its extended jurisdiction.

At present and subject to what appears below in reference to s. 47 (4) of the 1934 Act, if an action which could have been commenced in a county court is brought in the High Court and the plaintiff recovers less than £40 if founded on contract, or £10 if founded in tort, he can recover no costs in respect of the proceedings in the High Court. If he is more successful and recovers £40 or upwards but less than £100 on contract, or upwards of £10 but less than £50 in tort, he is entitled to no more costs in respect of the proceedings in the High Court than he would have been entitled to if the action had been brought in the county court. It will be remembered that even where the plaintiff recovers *more* than £100 on contract or *more* than £50 in tort, he might be penalised by the costs of his proceedings in the High Court being assessed on the county court scale if the judge was of opinion that the action *ought* to have been commenced in the county court (*Goadby* v. *Orridge* [1938] 1 K.B. 641).

Under the revised provisions proposed in cl. 1 (2) of the new Bill, it is stipulated that if less than £75 is recovered in such an action as has been mentioned, no costs at all will be recoverable: this one figure, covering both claims on contract and in tort, replacing the existing £40 on contract and £10 in tort. And in all other such cases (without any expressed upper limit) the plaintiff will not be entitled to costs in excess of the county court scale.

These proposals go beyond the recommendations of the Evershed Committee. The raising of the existing figures of £40 on contract and £10 in tort in s. 47 (1) (*a*) of the 1934 Act to £75 in respect of either kind of claim was not the subject of any recommendation. Moreover, the proposed treatment affecting other cases differs in one material respect from the committee's recommendations. The cases in tort to which the committee suggested the sanction should be applied were those in which more than £10 but less than £200 was recovered. This latter, on the basis of an upper limit of jurisdiction proposed at £300, left a "margin" of £100—between £200 and £300—which would carry an entitlement (virtually as of right—unless the principles of *Goadby* v. *Orridge*, *supra*, were applied) to High Court costs. There is not now to be such a margin.

The result must be to place an additional burden upon the advisers of plaintiffs in the more substantial claims falling within the court's extended jurisdiction, particularly those claiming compensation for personal injuries. If such an action is brought in the High Court and the damages awarded are less than £400, something (possibly a significant sum) is likely to be lost in irrecoverable costs. The hazards of this situation are possibly to be alleviated by the power, contained in s. 47 (3), under which an order can be made for High Court costs if (*inter alia*) there was sufficient reason for bringing the action in the High Court—in what the Evershed Committee refer to as "a proper case."

These provisions are modified, as respects the general debt-collecting cases, by the continued application, but with amendments, of s. 47 (4) of the 1934 Act. Where the claim is for a debt or liquidated demand only for £40 (increased from the present £20) or upwards and the plaintiff is paid, or obtains judgment for £40 (instead of £20) or upwards in default of

appearance or of defence or under R.S.C., Ord. 14, the plaintiff will be entitled to High Court costs.

It may be supposed that when the amended s. 47 becomes effective, the issue of writs of summons to recover sums between £20 and £39 19s. 11d. will cease; and that some circumspection will be observed as respects claims between £40 and £74 19s. 11d. which may possibly be wholly or partly contested.

Recovery of land

In actions for the recovery of land, which of course include the familiar possession cases, the basis of jurisdiction is proposed to be changed to the net annual rateable value, instead of full annual value or rent; and the upper limit of such value is to remain at £100. This will operate as an extension of the court's jurisdiction, and goes beyond the Evershed Committee's recommendation that the figure should be £60.

Consequential or related amendments are proposed to utilise the same standard of net annual rateable value in place of the full annual value in other statutory provisions (cl. 2 (2) and Sched. I, Pt. II).

For any of these purposes, the "net annual value for rating" is to be determined as at the time when the relevant proceedings are commenced (unless otherwise provided by statute) and by reference to the valuation list in force at the time in question, subject to an artificial assessment where the property of which the value is in question is not separately rated. In such a case, the property is to be taken as having a net annual rateable value equal to three-fifths of its full yearly value.

Admiralty proceedings

The jurisdiction of Admiralty county courts is proposed to be raised from £300 to £1,000 in relation to the amount claimed, and from £1,000 to £3,500 in relation to the value of property saved where that value is relevant (cl. 3).

Probate proceedings

The basis of the jurisdiction conferred on judges of county courts in probate proceedings by s. 60 (1) of the County Courts Act, 1934, is also proposed to be extended. At present, the statute refers to cases where a probate registrar is satisfied that the personal estate of the deceased is under £200 and his real property does not exceed £300 in value. The substituted provision contained in the new Bill refers to an estate of less than £1,000 in value, without regard to its nature or constituent parts. Such value is to be that at the time of the deceased's death, without deduction on account of his debts.

Jurisdiction by agreement

It is proposed to amend s. 43 of the County Courts Act, 1934, in order to reverse the effect of the decision in *Lea* v. *Moore* [1955] 1 W.L.R. 38; noted on another point, *ante*, p. 43. The result will be that parties will be able to confer jurisdiction on county courts by consent without first commencing proceedings in the High Court.

Extension of the registrar's powers

At the present time a registrar is empowered to hear and determine (besides undefended actions) any action or matter in which the sum claimed or the amount involved does not exceed £10, or where the claim is for the return of goods not exceeding £10 in value, or of hire-purchase goods where the unpaid balance of the hire-purchase price does not exceed £10, on application of the parties and by leave (which may be either general or special) of the judge. Clause 9 (1) of the new Bill proposes an amendment of the county court rule-making powers in two important respects—to authorise the making of rules which will (1) raise the £10 limit to £30 and make the power exercisable "by leave of the judge, and in the absence of objection made in accordance with the rules by any of the parties," and (2) confer power on the registrar to try any action (whatever its nature or the amount involved) "by leave of the judge, and with the consent of the parties."

Place of trial

By cl. 10 of the Bill, it is proposed to provide for the making of county court rules which would authorise the judge to direct that any action pending in any court on his circuit shall be heard—presumably because it may be thought to be convenient or expedient—at any other such court.

Appeals from county courts

It has been thought necessary to propose further provision for rights of appeal from county courts in relation to cases within the extended jurisdiction and which would at present have to be brought in the High Court. The general design is that (in addition to the existing right of appeal on a point of law under s. 105 of the 1934 Act) there shall be "a right of appeal on fact in actions of contract and tort involving more than £200, but not in actions for the recovery of possession of premises to which the Rent Restrictions Acts apply." The necessary details are worked out in cl. 11 at some length in nine sub-clauses. Apart from the contract and tort cases where the debt, demand or damage claimed exceeds £200, a right of appeal is specifically conferred where the relief sought includes an injunction. The standards in other cases are—

(*a*) in actions for the recovery of land: net annual rateable value exceeding £60;

(*b*) under s. 138 of the 1934 Act—transfer from the High Court for the purposes of execution: debt exceeding £200;

(*c*) in interpleader proceedings: amount or value of money or property claimed exceeding £200;

(*d*) in probate proceedings: value of estate exceeding £500; and

(*e*) in Admiralty proceedings: amount claimed exceeding £200.

G. M. B.

A Conveyancer's Diary

A GAP IN THE PROVISIONS OF A TRUST

IT was not very long ago that I was writing in this "Diary" of the decision in *Re Follett* [1954] 1 W.L.R. 1430 (see 98 SOL. J. 880), a case in which the omission from a will of a number of words of a standard form taken from a book of precedents made nonsense, or something very like nonsense, of what remained. The court found it possible there to supply the omission as part of the process of construing the will, applying the principle that where it is clear on the face of a will that there is an omission, and also clear from the context what the omitted matter is, the omitted matter may be supplied in order to effectuate the intention of the testator. It seemed to me that this decision was a bold one, although certainly one which did justice in that the result which flowed from it was far more likely to effectuate the testator's intention than would have been the result of following out literally the truncated provisions which appeared in the will.

Now another case has been reported, *Re Cochrane* [1955] 2 W.L.R. 267, and p. 96, *ante*, which shows how reluctant the court is to trust its arm, as it were, in these cases, and how fine some of the distinctions which are drawn in this type of case can be.

To appreciate this fully it is necessary to go back somewhat. In *Re Akeroyd's Settlement* [1893] 3 Ch. 363, the wife's fund comprised in a marriage settlement was limited to the wife for life, with remainder to the husband until he should become bankrupt, with remainder after the death of the survivor of the wife and the husband upon various trusts for the benefit of the children and remoter issue of the marriage. The wife predeceased the husband, and the husband became bankrupt, so that his interest in the fund ceased, but as the ultimate trust was not expressed to come into operation on the bankruptcy of the husband, but only (in the event which happened) on his death, there was, *prima facie*, a gap. The court held that it was a gap which could be filled by declaring that the ultimate trust for the children and issue of the marriage had come into operation, and that the children were entitled to the income of the fund from the bankruptcy of the husband.

Reports of cases of this kind suggest that they are often very much cases of impression. Thus Lindley, L.J., in his judgment, said that, looking only at the recitals and the operative part of the settlement, it appeared to him to be as plain as could be that the real intention of the parties was that the property was to go to the children upon the termination of the life interest of their parents; he could not doubt that for a moment, and could not call that guessing. The intention was plain, but by a piece of bad drafting the draftsman had failed to give full effect to that plain intention, because in the gift over he had confined its operation to a particular event instead of putting in some general words which would have covered any events. This kind of flaw, in the view of Lindley, L.J., was not one which required a suit to rectify the instrument; the mistake could be corrected by construction provided that the intention was clear from the document itself. (It has already been seen from the decision in *Re Follett* that this principle is equally applicable to wills, where, of course, there can be no question of rectification. There is no difference in this respect between instruments executed *inter vivos* and testamentary documents.)

The other members of the Court of Appeal agreed with this view. Roper, L.J., said that the intention behind the settlement could be tested by seeing what would happen in the alternative event of a resulting trust of the income; in that event it would have gone to the husband's creditors in bankruptcy, the very event which the settlors had been careful to try to prevent. A. L. Smith, L.J., construed the direction that the ultimate trust for the children and remoter issue should come into operation from and after the death of the survivor of the spouses as, in effect, a direction that it should take effect subject to the respective interests of the spouses, a construction which has been adopted in somewhat similar contexts in the past.

Before turning to the recent decision, it is important to bear in mind that the ultimate trust for the children and remoter issue in *Re Akeroyd's Settlement* was, shortly, a trust for such of the children as should attain the age of twenty-one years and for the issue *per stirpes* of any child who should die under that age leaving issue. There was no power of appointment incorporated in this trust.

In *Re Cochrane*, by a settlement (which was a post-nuptial settlement, and not a settlement upon marriage, but nothing turned on this), the funds subject thereto were limited upon trust in the first place to pay the income to the wife during her life so long as she should continue to reside with the husband and remain faithful to him, and after the death of the wife or the prior determination of the trust in her favour upon trust to pay the income to the husband, if then living, during his life; and finally, after the death of the survivor of the husband and the wife, upon trust for the issue of the marriage in such shares, etc., as the husband and the wife should by deed jointly appoint, and in default of such appointment as the survivor should by deed or will appoint, and in default of any appointment under either of these powers in trust equally for such of the children of the marriage who should attain majority. The wife received the income of the fund for some years until she left the husband, when her interest in the income ceased and the income became payable to the husband until he died. There were two children of the marriage who attained the age of twenty-one years. The joint power of appointment was never exercised.

The husband died in 1953, leaving the wife surviving him, and thereupon a problem similar to that in *Re Akeroyd's Settlement* arose as to the disposal of the income of the fund in the interval between the death of the husband and the death of the wife, on which latter event the funds were expressed to become payable to the children. It was argued that the gap in the provisions of this settlement could be filled in the same way as the similar gap had been filled in the earlier case, by directing that the income of the funds should be paid to the children or their representatives (one had predeceased her father) until the death of the wife. Harman, J., did not accede to this argument. Admittedly there was a gap in the provisions of the settlement, but the difficulty in this case was to see what it was that was required to fill the gap. The wife, notwithstanding that she had forfeited her beneficial interest in the income of the funds when she left her husband, still had the power (which after the death of the husband was hers alone) to dispose of the funds by deed or will, and this power was vested in her for the remainder of her life, and by exercising it she could at any time alter the shares in which the funds should be divided between the children of the marriage. In the face of that it was impossible, in the learned judge's view, to hold that the ultimate trust for the benefit of the children had come into operation on the death of the husband.

The consequence was a resulting trust of the income arising from the funds in the interval between the deaths of the spouses, for the benefit of the wife and the estate of the husband, in proportion to the size of the funds which each spouse had contributed to the settlement.

Put in this way (which was the way in which Harman, J., put it), the distinction between this case and that which arose in *Re Akeroyd's Settlement* is broad enough: until the power was exercised, or extinguished by the death of the wife, it was impossible to say in what proportions the capital of the fund was to go among the children or what their respective entitlements under the settlement were to be, and in these circumstances to direct a division of the income pending the distribution of the capital could be said to involve a guess at the intentions of the settlor, and that in these cases is impermissible. The court must be satisfied not only that there is a gap in the relevant provision, but how the gap is to be filled. Taken alone, the power of appointment in the trusts in *Re Cochrane* is a distinguishing factor of considerable potency. But behind the power there was here, as there almost always is in trusts of this kind, a trust in default of the exercise of the power which, again taken alone, was in all essentials identical with the ultimate trust for the benefit of children and remoter issue in *Re Akeroyd's Settlement*. Could it not have been said

in *Re Cochrane* that, as the ultimate intention of the settlors in relation to the capital of the trust funds, which was completely expressed in the settlement, was that the children of the marriage should take in equal shares, subject to any exercise of the powers of appointment conferred upon the settlors and the survivor of them, this would also have been their intention in relation to any income which could arise after the termination of the spouses' respective interests therein and before the event on which the trusts of capital had been expressed to commence? If not, is not this a distinction of almost metaphysical subtlety? It is a pity that this point, which could hardly have been absent from the mind of the learned judge, was not dealt with in his judgment. The fact that the power of appointment of the wife was outstanding while she lived, on which this decision really turned, loses some at least of its importance when the sight is lifted to the trusts in default behind the power.

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Landlord and Tenant Notebook

LANDLORD AND TENANT ACT, 1954, PART I: DETERMINING FUTURE QUESTIONS

SECTION 20 of the Landlord and Tenant Act, 1954, read by itself, invites speculation. "Where under this Part [Pt. I] of this Act any question falls to be determined by reference to the circumstances at a future date, the court shall have regard to all rights, interests and obligations under or relating to the tenancy as they subsist at the time of the determination and to all relevant circumstances as they then subsist and shall assume, except in so far as the contrary is shown, that those rights, interests, obligations and circumstances will continue to subsist unchanged until the said future date." The section is apparently designed to prevent a court from, or to save it the trouble of, speculating; but the reader may be inclined to speculate about why and when.

It may be that the draftsman (if such functionaries have time for such practices) was inspired by Ophelia's "We know what we are, but we know not what we may be," but it is perhaps more likely that *Wolfe* v. *Hogan* [1949] 2 K.B. 194 (C.A.) has effectively drawn attention to a defect in modern legislation governing the relationship of landlord and tenant. That defect may be described as the assumption that, whenever that relationship is established, the use to which the tenant may put the landlord's premises is automatically determined. Thus the Housing Act, 1936, s. 2, imports conditions into contracts "for letting for habitation a house" and defines, for its purposes, "landlord" as "any person who lets for human habitation to a tenant, etc."; but what constitutes letting for (human) habitation is not dealt with. The Public Health Act, 1936, s. 343 (1), defines "house" as a dwelling-house; it is not immediately concerned with the relationship of landlord and tenant, but does affect demised premises as it does others, and fails to indicate what is to make a building a "house." Of more recent statutes the Agricultural Holdings Act, 1948, applies a number of tests: "agricultural holding" is itself defined (s. 1 (1)) in terms two of which, "agricultural land" and "contract of tenancy", are themselves defined (s. 1 (2) and s. 94 (1) respectively), and the definition of the former again uses an expression—agriculture—later itself defined (s. 94 (1)); and, when these have been considered, the actual use of the land is a vital factor. We have yet to learn, as far as authority is concerned, whether an otherwise qualified tenant who used land for the purposes of agriculture in infringement of the provisions of his contract of tenancy could establish that the land was an agricultural holding. The Landlord and Tenant Act, 1954, Pt. II, considers both use and restrictions, though, as was suggested in the "Notebook" on 6th November last (98 SOL. J. 743), the result is not always very clear.

However, there is a tendency to make it easier for the practitioner to tell his client whether or not some statute applies to the property he lets or has taken, and I suggest that one reason for the improvement is to be found in *Wolfe* v. *Hogan*, *supra*, and kindred authorities. For the housing shortages brought about by wars which occasioned the enactment of rent control legislation likewise occasioned the occupation as dwellings of buildings which, at one time, no one would have thought of so using. I might instance those solid structures known as "Martello Towers," themselves one of the results of earlier warfare. And failure to visualise such possibilities made the "this Act shall apply to a house or part of a house let *as* a separate dwelling" of the Increase of Rent, etc., Restrictions Act, 1920, s. 12 (2)—words which occurred originally in the Increase of Rent, etc. (War Restrictions) Act, 1915, s. 2 (2)—inadequate.

The authorities showed that effect would always be given to an express provision; in the early days of rent control it was said, in the leading case (on mixed tenancies) of *Epsom Grand Stand Association, Ltd.* v. *Clarke* (1919), 35 T.L.R. 525 (C.A.), that if the agreement were to let premises as a barn the tenant, even though he lived there, could not be heard to say that they were let as a dwelling-house. But the vast number of lettings of properties within the rent control rent or rateable value limits on terms which said nothing about user necessitated the introduction of further tests. Description in what, in a well-drawn lease, would be the equivalent of the parcels has been an important factor; and so has evidence of past user: e.g., in *Greig* v. *Francis & Campion, Ltd.* (1922), 38 T.L.R. 519 (rooms above shop used as living accommodation). At the same time it came to be recognised that premises could be taken out of the Act on the occasion of a new letting (*Williams* v. *Perry* [1924] 1 K.B. 936); and that even during the currency of a tenancy parties could, by conduct, vary the purpose of the letting, though mere acquiescence by a landlord would not bring premises within the Act (*MacMillan & Co., Ltd.* v. *Rees* [1946] 1 All E.R. 675 (C.A.)).

But it was *Wolfe* v. *Hogan* which occasioned something like a comprehensive review of the position by the Court of Appeal. A tenant of a house sublet part to the defendant, an antique dealer, and it was clearly "contemplated" that she was to use that part as a shop. The inference could be drawn not only from what the mesne tenant knew about her business, but also from the fact that she had a flat in the neighbourhood and that the rooms sublet included no sanitary accommodation. She afterwards moved in as a resident; whether the mesne tenant and the freeholder knew about this or not was disputed, but the plaintiff, who bought the freehold after the mesne tenancy had determined, was not aware of the position. At first instance Stable, J., read an implied restrictive covenant into the sub-tenancy, construing it as an agreement limiting user to that of a shop. The Court of Appeal held that this was

going too far, but upheld the judgment for possession on the ground that there had been no letting as a dwelling-house, even if the defendant had "in the recesses of her mind" decided that she would so use the premises. *De facto* use at the time when proceedings were taken was not the test.

Now Pt. I of the Landlord and Tenant Act, 1954, which confers rent control protection on certain tenants who were excluded from such by the "less than two-thirds of the rateable value" provision in s. 12 (7) of the Increase of Rent, etc., Restrictions Act, 1920, necessitates some looking ahead in various cases. Applicability itself depends partly on "the circumstances (as respects the property comprised in the tenancy, the use of that property, and all other relevant matters) [being] such that on the coming to an end of the tenancy" the tenant would, if the rent had exceeded two-thirds of the rateable value, be entitled to retain possession (s. 2 (1)); and the position can be gone into within the twelve months before the contractual tenancy is due to expire, the court then having to consider what is or is not "likely" (s. 2 (2) (*a*)). Again, when deciding upon the standard rent for the statutory tenancy which is to follow, regard must be had to existing other terms (s. 9 (5)); and if a landlord seeks possession on the ground of intention to demolish or reconstruct, a court may have to consider what premises are "likely" to be premises which the tenant would be entitled to retain (s. 12 (2) (*b*)). Section 20 creates a presumption—but only a presumption—that things will remain as they are.

R. B.

HERE AND THERE

LEGISLATING FOR VIRTUE

WHATEVER you may say about the luxuriantly branching case law in which the common law expresses itself, it has through the mouths of the judges constantly sought to express the common agreement, the *communis sententia* of English humanity. The transition from one age to another has, it is true, sometimes brought in a note of casuistic subtlety, but at least it has never indulged in the vice of reformism; its fabric is too well saturated with common sense for that. It is by way of the statute book that fads and experiments are blown into our law by the accident of whatever political winds happen to be blowing at the time. The sort of law that aims at making people better behaved, more reasonable, more disciplined than they are is by its very nature not a matter of common agreement. The medieval sumptuary laws, or the abolition of Christmas ("this foolish day's solemnity") under the Commonwealth, the gambling laws, the drinking laws, "D.O.R.A." in the first World War and the even more paternal *minutiae* of the Defence Regulations and their progeny in the second World War, all share the same characteristic of going against the grain of the common mind. The tyranny of convention is quite bad enough—to be told that one must do a thing because everybody does it—but at least there is in the command an appeal to the common experience of humanity. There is no such appeal when one is told that one must do something because a little group of people with an itch for moral reform have gained the ear of a quorum of legislators.

CONSTITUTIONAL WINK

EVER since the seventeenth-century Puritans, legislators have been intermittently trying to make England good by statute and within the meaning of this Act and that. Luckily their zeal has ebbed as well as flowed, whether in despair at the obstinate irreclaimability of the English or stunned by the weight of their natural unparliamentary goodness depends on whether the legislators themselves at any given time retained all the reassuring single-mindedness of self-absorption or suddenly slipped disconcertingly into something like humility. In the United States, where the task of blending disparate elements into a homogeneous whole has been hurried through in a couple of centuries, instead of being spread, as in the case of the other nations we know, over something far more like two thousand years, there has been a noticeable tendency to legislate for virtue. The Constitution of the United States is dogmatic beyond any other Constitution in the world. It presupposes a moral basis of society and that gives it direction and seriousness of purpose, even if one is occasionally entertained by some of the minor effects which flow from that attitude of mind. But it has also produced the system of law by which the acts of the Legislature can be referred back to the measuring-rod of the Constitution, a check unknown to us on the omnipotence of transitory majorities. Perhaps most people in this country may have missed a pleasant little example of how the thing works, of the virtuous instincts of some transatlantic legislators and the protection against the oppressive blanket of too much virtue which the courts may afford to ordinary reasonable citizens and, more important, seeing what normal human behaviour is like, the ordinary unreasonable citizen. Perhaps Sioux City in Iowa has a very special local climate. The shadow of the Red Man obviously still dominates its consciousness and the memory of the stage coach and the pioneers and the six-shooter in the saloon. All this and a good deal more may well lie behind the local law that it is illegal to wink at a girl in the street in order to get on speaking terms with her. In our vague haphazard English way we would be content to talk generally of "insulting behaviour" and leave it at that in the discretion of the local bobby. But in America they like to be explicit about that sort of thing. But once they are explicit in a matter of principle there is a wide open invitation to the judiciary to test the legal basis of the whole matter and that is just what has happened in Sioux City. An Air Force sergeant winked at a police station switchboard girl and was prosecuted under the law. (It is odd that he had not brought himself within the ambit of some other law too dealing with the relations between the military and the civil powers.) Anyhow the matter came to court and the judge decided that the law was unconstitutional. And why? Because it was a clog on the fundamental right of the American citizen to freedom of speech. Doubtless the matter is by now well on its way to the Supreme Court.

ITALIAN SURPRISE

THAT little incident links up curiously with the recent drive against kissing in Turin. To the English who are accustomed to thinking of themselves as restrained and undemonstrative and of the Italians as passionate and unrestrained that sort of news always comes as a surprise, but it is not new news, for in Italian law, if not in Italian practice, there is an unexpected element of paternal puritanism. In Rome as well as in Montreal naked statues have been provided with ingenious aids to decency. The drive of turning a hundred plain-clothes policemen loose in the Turin cinemas to detect kissing couples and warn them of impending prosecution inspires an Italian reaction somewhat similar to that of our own drinking and gambling law enforcement at home. It is not even certain that it has so solid a legal basis, for a

couple of years ago an appeal court quashed a conviction for kissing in a Naples cinema. The local students are said to be protesting that the police action is illegal on the ground of the " violation of the rights of youth." Though that does not strike the note of high seriousness of the right to freedom of speech, one cannot but wish it well if counsel ever try to translate it into a legal formula. It has promising possibilities for the stuff of which continental forensic eloquence is made.

RICHARD ROE.

REVIEWS

Motor Claims Cases. Third Edition. By LEONARD BINGHAM, Solicitor of the Supreme Court. 1954. London: Butterworth and Co. (Publishers), Ltd. £2 15s. net.

It does not seem three and a half years since we welcomed the second edition of Mr. Bingham's useful collection of notes on points commonly arising on running-down cases. We never notice the advance of years in our really close friends. In this latest issue some sub-division of chapters and a little pruning of matter readily accessible elsewhere have had a wholly beneficial result. The comprehensiveness of the book is still its most valuable characteristic.

From one point of view, we should not like to see the scope of the work restricted in the slightest. At the same time, the author shows a tendency to impinge on matters which have no particular relevancy to motor car cases—the line of cases on misnomer of the plaintiff, for instance. By the way, the lay-out adopted for one of these cases (*Alexander Mountain & Co.* v. *Rumere, Ltd.*) on p. 446 might easily induce in the reader an entirely erroneous impression of the ultimate decision. It is a matter of putting the thick type in the appropriate place, and this needs attention in other parts of the book, too. Then, again, why give the decision in *Re Wilson, decd.*, at p. 342 to the exclusion of the remainder of the law of adoption? Similarly, the Court of Appeal decision in *Lees* v. *Motor Insurance Bureau* (p. 516) has nothing specially to do with the subject-matter of the book. We mention this wandering towards topics only remotely relevant merely as a suggestion for the future if further pruning becomes necessary to keep the volume within a handy compass. We are always glad to read Mr. Bingham's breezy treatment of any subject if he is satisfied that he has room for it.

While on the matter of suggestions, we would have cited *Jacobs* v. *L.C.C.* on p. 459 as reinforcing the *dictum* from *Armstrong* v. *Strain*; and *Dummer* v. *Brown* on p. 392 as indicating a possible way round *Hollington* v. *Hewthorn*. But we shall nevertheless continue to use this indispensable casebook, and vastly enjoy ourselves in the process.

Paterson's Licensing Acts. Sixty-third Edition, 1955. By F. MORTON SMITH, B.A., Solicitor, Clerk to the Justices for the City and County of Newcastle-upon-Tyne. London: Butterworth & Co. (Publishers), Ltd.; Shaw & Sons, Ltd. £2 17s. 6d. net.

Mr. Morton Smith and his publishers are to be congratulated on producing this year's edition of " Paterson " in good time before the month of February. The book is eighteen pages shorter than the 1954 edition, mainly, it seems, as a result of the omission of the Cinematograph Regulations, 1923 and 1930; these are not included because it is anticipated that they will soon be replaced by new regulations. Mr. Morton Smith draws attention to the new statutes passed and the fresh cases decided in 1954, in his Preface, and once more it can be said, with confidence, that anyone concerned with licensing will find all he needs lucidly and accurately set out in this book. The latest edition worthily maintains the standard of its predecessors.

Fire Policy Drafting and Endorsements (for Home Fire Business). Second Edition. By EDWARD E. MASON, A.C.I.I. 1954. London: Sir Isaac Pitman & Sons, Ltd. 18s. net.

Although primarily designed for the student taking the Chartered Insurance Institute examinations, this well-indexed work forms a useful book of reference in helping to solve the occasional fire insurance problem.

To compose a wording accurately describing the particular property insured and showing plainly the scope of protection given calls for great care. Much has been done in the past twenty years in this specialised section of insurance work to simplify and clarify policy wordings and it is valuable to have a summarised record in the form that this book takes.

The Common Law Library, Nos. 1, 2 and 3 (General Editors: JOHN BURKE and PETER ALLSOP) being:—

Chitty on Contracts. Twenty-first Edition. Vol. I, General Principles, Vol. 2, Specific Contracts. 1955. London: Sweet & Maxwell, Ltd. £7 15s. net (2 vols.).

Clerk and Lindsell on Torts. Eleventh Edition. 1954. London: Sweet & Maxwell, Ltd. £4 15s. net.

If ordered together, £11 5s.

Since 1909 those stalwarts of the common law, Chitty and Clerk and Lindsell, have marched together under a common command. Their three new volumes display the best turn-out on parade of any muster of law-books since the war. Type, format and binding are superb, and the publishers must have had a prophetic inkling of the plea of a recent *Times* correspondent for built-in bookmarks. To handle such volumes is to find detailed criticism considerably disarmed.

But the practitioner can hardly afford to buy the books for the sensual pleasure of turning over their leaves, or for their decorative value on his shelves. So the reviewer has perforce to consider the matter of textual merit, and having done so reiterates the epithet—merit. In composing a legal text-book an author may merely state the law, or he may discuss the law; he may concentrate on principles with appropriate references to illustrative cases, or he may describe the leading cases and statutes and so synthesise the rules. Each method has its advantages for different classes of user. These books are compendia for the practising lawyer, who starts any particular piece of research from the index, the table of cases or the table of statutes. We have tested these approaches with substantial satisfaction (though, strangely enough, the advertised reference on p. 539 of the first volume of Chitty to *Bennett* v. *Bennett* eluded us). The indices are full, and a helpful feature in Chitty is that the leading references in vol. 2 are noted in the index to vol. 1 and vice versa.

Having tracked down the required page, the user finds the text divided into conveniently numbered paragraphs, usually sub-headed by a catch-phrase in heavy type. (The numbering of paragraphs betokens, alas, the necessity for supplements in a changing world.) Thus, with the case of *Beckett* v. *Newalls Insulation Co., Ltd.* [1953] 1 W.L.R. 8 in mind, we turned up " gas " in the index of Clerk and Lindsell. Among nine numbered paragraphs on Gas in the chapter devoted to Dangerous Property, Premises and Things, we came upon one headed " Gas in container," and there set out is a general warning of the high standard of care required of those who bring on to premises gas in containers, followed by an epitome of the facts and decision in *Beckett's* case and a sentence from one of the judgments. Throughout both works, principle, maxim, illustration and *dictum* are blended into an argument so compact yet explicit that a solicitor consulting them must often be saved recourse to the law reports, and should lose no time in finding the right authority (if one exists!) when he does take down a case book.

The division between the volumes of Chitty is into " General Principles " and " Specific Contracts." Interesting features of the second are chapters on Bankers' Contracts, Conflict of Laws and Marriage Contracts, while the Chapter on Partners contains a section on Medical Partnerships. In dealing on p. 671 with damages for non-delivery of goods under a contract of sale, the editors state that the damages may be fixed by the terms of the contract, but no reminder is added of the nice question which may arise as to whether a sum so fixed is really in the nature of liquidated damages or is a penalty. A cross-reference to p. 425 of vol. 1 would repair this omission neatly.

Clerk and Lindsell adopts a standard arrangement of its subject except that it includes valuable chapters on Distress, Franchises and Copyright. Limitation forms the subject of a section in the chapter on Discharge of Torts, and demonstrates the inclusion of the most recent statute law (as does Chitty in respect of Hire Purchase and of the late mutilation of the Statute of Frauds). But this limitation section perpetuates the heresy of the head-

notes in *Archer* v. *Catton & Co., Ltd.* [1954] 1 W.L.R. 775, which we endeavoured to expose in an article at 98 SOL. J. 447, kindly amplified by a correspondent at p. 507. We are disappointed that the present editors have missed an opportunity of putting this perfectly correct decision on its right basis.

Let us not end, however, on a note of cavil. Rather will we assure solicitors who may often have wondered which of the many treatises on the fundamentals of the common law will best suit their purposes that if they want completeness as well as a practical arrangement of the subject-matter they need wonder no more!

TALKING "SHOP"

PLAIN TALES FROM THE SHELVES—IV

THAT STUBBORN CREW

To the artist—and I apply the term in a wide sense to anyone who practises a fine art—there is probably no one more congenitally uncongenial than a lawyer, unless it be another artist. And so it need occasion no surprise that, when law and art drip alternately upon the red-hot plate of professional difference, a furious blaze results. The process may be compared with that wartime oil-and-water system of firing the oven which was used in the Iraqi desert; but that, when it worked, did at least cook the troops' dinner. Between the two—lawyers and artists or law and art, it does not matter—the sympathies are torn. Even for the lawyer, who is usually in part an artist, it is not always so easy to side with the lawyers.

Let us freely admit that, even without the help of artists, lawyers can contrive on occasion to cut a foolish figure. Before we come to a few cases in the realm of art, let us examine one which is artlessness itself—*Ellis* v. *Loftus Iron Company* (1874), L.R. 10 C.P. 10—and just compare the legal and lay views of it. The facts? Through the fence separating the plaintiff's land from the defendants', the defendants' horse bit and kicked the plaintiff's mare. Simple, says the layman: judgment for the plaintiff! But the learned Glamorganshire county court judge did not think it so simple and found for the defendants. It was only on appeal that the lawyers contrived to find some legal basis for the lay view, and then only after much heart-searching. For, needless to say, the defendants' horse had "as quiet a temper as you could wish a horse," and had never kicked or bitten any animal before. So was it negligence or trespass or what?

The plaintiff had evidently foreseen trouble and was taking no chances, so he was careful to plead that the defendants were "possessed of an entire horse"—not, be it noted, a mere undivided share, whether at the gnashing or nether end.

The question of trespass exercised the court and counsel a good deal. Was it trespass if the horse put his head over the fence and bit the mare? Or his heels through the fence and kicked her? Field, Q.C., for the plaintiff, reckoned that "the owner of an animal is responsible if the animal does that which *if done by the owner himself* would have been a trespass, apart from any question of negligence" (citing authorities, but we will not bother with them). Against the mirth of artistic Philistines at this vision of personal assault upon the plaintiff's mare we hastily shut ears and consciousness. There was at least one satisfactory feature. All the lawyers concerned were content to accept it that the mare was at all material times of compact and impact *res integra* on her own side of the fence—not even balanced upon it in the classic posture attributed to a certain politician. Had she so much as protruded head or hind of her for punishment over the boundary, there is no telling what horse-sense the lawyers might have made of it.

If this is what the law can do with horse-bites—and in all fairness, let it be said that justice, by a long road, was done—it is no wonder that it sometimes gets into deep water with art. The law in pursuit of art resembles a school of porpoises amongst flying fish; they are both graceful in their way, but the flying fish usually tire first. Many bitter things were said recently about the crassness of the Swindon magistrates when they condemned the "Decameron" of Boccaccio as obscene. Let anyone read Novel *X* of the Ninth Day—how Dom Gianni at the instance of his gossip, Pietro, used an enchantment to transform Pietro's wife into a mare—and then ask himself how he would contrive its publication in any contemporary periodical in this country? If the Swindon magistrates failed to perceive that obscenity is a relative term, changing its colour chameleon-wise against variable backgrounds of time, art and popular prejudice, I, for one, think it a little captious to find fault with them. They were, at worst, falling into one of those pits that the law digs for itself—a very natural mistake.

This sort of thing does, of course, exacerbate the artists. Even Mr. Richard Aldington, whose scrupulous fairness stands out from every page of his biography of that strange character, D. H. Lawrence ("Portrait of a Genius, But . . ."), cannot bring himself to be kind to the law. "Hearing that William Blake had been dead for a century, the prosecution withdrew the charge against him" is one of his milder observations. And when some of Lawrence's pictures were removed from the Warren galleries on the order of "a magistrate called Mead": "Good God!" But succinct as this is, the artistic view has seldom been better expressed than by Lawrence himself in a couplet that his biographer quotes, the second of a quatrain in which Lawrence described London policemen

> "In virgin outrage as they viewed
> The nudity of a Lawrence nude."

A pity that his other squibs were neither so witty nor in such an agreeable vein.

Admittedly, the artist himself can be a troublesome fellow and all too often answers to the description applied by Darling, J., to a certain revivalist, the unsuccessful appellant in *Wise* v. *Dunning* [1902] 1 K.B. 167. As all the world knows, Darling, J., was fond of quotations. "The kind of person which the evidence shows the appellant to be I can best describe in the language of Butler. He is one of

> . . . that stubborn crew
> Of errant saints, whom all men grant
> To be the true Church Militant
> * * * * *
> A sect, whose chief devotion lies
> In odd perverse antipathies."

And the learned judge, or it may be the reporter, obligingly supplies the reference from "Hudibras", Pt. I.

It may be due to the fanaticism or cussedness of artists that lawyers are seen at their worst when the law comes into conflict with art, or it may be (as the artists are sometimes heard to say) due to the narrow-mindedness of lawyers. But one thing is certain—that the lawyers become less doleful when, instead of quarrelling with the law, the artists quarrel with other artists. Indeed, when these quarrels concern, as they frequently do, the nature and originality of artistic genius, the artists tend to wax both wroth and incoherent,

but the lawyers, finding themselves on familiar ground, relax in preparation for a diverting forensic field-day. For the law may be clumsy when it attempts to dabble in the occult and unanswerable question of what is art, but when it comes to deciding between one artist and another, it is not lacking in expertise. All of which brings me to the copyright cases that I had intended to mention this week. Following our usual practice in this series, we shall ignore whatever little law may remain in them since the passing of the Copyright Act. And this will be most convenient, for as a head-note, "Oh, the little more and how much it is," will serve very well for the lot—just that, and as Poe remarked of his raven, nothing more.

Let us take first *Planché* v. *Braham* (1837), 4 Bing. N.C. 17–20. The plaintiff had drawn up the English libretto for the music of Weber's opera, "Oberon, or the Enchanted Horn." The defendant played the principal part when the opera was performed at Covent Garden. Later the defendant caused another libretto to be written by another artist for the same music and then performed the opera with the new words and a new title at his own theatre, where he again played the principal part. But the defendant, in the new version, continued to sing the plaintiff's words to two or three airs, whereupon the plaintiff brought this action against him under the statute 3 & 4 Will. IV, c. 15.

The jury found that singing two or three songs of the plaintiff's libretto was a representation in part of the plaintiff's production, and the court refused to grant a new trial.

The report, we feel, hardly does justice to the plaintiff's wounded feelings as he sits in the stalls listening to the perfidious defendant rendering "the most striking airs," with the plaintiff's words still attached; nor to his indignation as he prepares to criticise the new libretto, and, instead, hears his own becoming airborne—especially (for the reporter mentions it) that favourite bit starting :—

"Ocean! thou mighty monster!"

We fancy that just at that moment he was ready enough to call the defendant a mighty monster too.

With this affair we may contrast *Chatterton & Another* v. *Cave* (1875), L.R. 10 C.P. 572, which concerned three dramatic versions of "The Wandering Jew". The first of these, which was not in dispute in the action, was a French version. The second was an English drama, translated or adapted from the French drama, and the copyright of this belonged to the plaintiffs. The third was also an English drama, brought out by the defendant. Both the plaintiffs' and the defendant's dramas were entitled "The Wandering Jew". The plaintiffs complained that the defendant had infringed their copyright. By agreement between the parties, it was arranged that the jury should be discharged and that the Lord Chief Justice, Lord Coleridge, should read the original French version and the two plays, which he did. He found that the defendant's drama was not, *except in certain respects*, a copy from or colourable imitation of the plaintiffs' drama. The chief interest of the case lies in the "certain respects" or points of resemblance between the three dramas, which, in tabloid form, were as follows :—

1. *Plaintiffs' Drama*

Act I, Scene 4. Wandering Jew represented, in the course of his wanderings, as having reached the Arctic Regions, the scene being lit up with limelight and the stage covered with icebergs. Whilst there he beholds a vision showing the dangers and sufferings of his descendants, whose history formed the subject of the drama.

Last Scene. Descendants of Wandering Jew represented as finally triumphant over the machinations of their enemies. Scene closes with Wandering Jew at back of stage, lighted up by red limelight.

2. *Defendant's Drama*

Act II, Scene 2. Wandering Jew in icy region, beholding vision of his descendants in peril.

Last Scene. Wandering Jew at back of stage, beholding final good fortune of descendants.

3. *French Drama*

Prologue. Wandering Jew watching over fortune of descendants (*per* Grove, J., the Jew is there described as being at Behring's Straits, a point apparently missed by the Lord Chief Justice).

Epilogue. Wandering Jew terminates wanderings: his ultimate salvation at the day of judgment. (*Per* Brett, J., "the idea . . . is that after the terrestial fortunes of his descendants have been finally settled, the Jew appears under a visionary aspect in a state of felicity".) Fate of the Jew's descendants adverse instead of prosperous. (Symbolical of the Continental view?)

Despite these resemblances, the court seems to have felt little difficulty in deciding that there had been no substantial plagiarism and upheld Lord Coleridge's verdict for the defendant. The existence of the original French drama, which contained features common to both the English dramas, must, I feel, have weakened the plaintiffs' case.

To judge from *D'Almaine & Another* v. *Boosey* (1835), 1 Y. & C. 288–303, the court may show less toleration towards musical borrowings. The dispute concerned certain airs from the opera "Lestocq", which the plaintiffs (being entitled to the copyright) recognised in the shape of quadrilles and waltzes published by the defendant; one of these was identified by the plaintiffs' expert musical witness with the air "Gentille Muscovite" and another with the air "Le Pauvre Ivan." The chief interest of the case lies in the observations of the Chief Baron, Lord Abinger, who seems to have taken judicial notice of certain matters on which two opinions might be held. After quoting Sir George Smart to the effect that "a mere bar did not constitute a phrase, though three or four bars might do so," the Chief Baron continues :—

> Now the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance or by transferring it from one instrument to another, does not, even to common apprehension, alter the original subject. The ear tells you that it is the same . . .

Well, does it? So much depends upon the ear; we have all heard of the Victorian person who could not distinguish "God Save the Weasel" from "Pop Goes the Queen." And I remember that Dr. Ivimey used to declare, with what truth I know not, that "Yes, We Have No Bananas" shares a musical phrase with the "Hallelujah Chorus." Moreover, the opening phrase of that, a phrase of four notes familiar in all musical and some non-musical gatherings, is set comfortably, and with a beat to spare, within the compass of a single bar.

"ESCROW."

Mr. NEVILLE LASKI, Q.C., has been appointed Master of the Library of the Inner Temple, and Mr. A. C. LONGLAND, Q.C., has been appointed a Master of the Bench.

Mr. JOHN TOWEY, formerly assistant solicitor to Bolton County Borough Council, has been appointed junior assistant solicitor to Blackburn County Borough Council.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note

HOUSE OF LORDS

APPELLATE TRIBUNAL: FINDINGS OF FACT

Benmax *v.* Austin Motor Co., Ltd.

Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Somervell of Harrow

20th January, 1955

Appeal from the Court of Appeal ((1953), 70 R.P.C. 284).

The main question in the appeal was whether the appellant's letters patent were invalid on the ground that the invention therein claimed was not new or did not involve any inventive step (Patents Act, 1949, s. 32 (1) (*e*) and (*f*)). The House of Lords unanimously dismissed the appeal.

VISCOUNT SIMONDS, in the course of his opinion, said that counsel for the appellant had argued that the existence of an inventive step was a question of fact which had been decided by the trial judge, Lloyd-Jacob, J., in his favour and that therefore the Court of Appeal should not have reversed his decision, save for certain reasons which were clearly not present. The statements in *Montgomerie & Co., Ltd.* v. *Wallace-James* [1904] A.C. 73, 75, and *Mersey Docks & Harbour Board* v. *Procter* [1923] A.C. 253, 258–9, were consonant with R.S.C., Ord. 58, rr. 1 and 4. One must distinguish between the finding of a specific fact and a finding of fact which was really an inference from facts specifically found. It was often hard to say what was simple fact and what was inference from fact, nor was it important to do so, save to explain why different views had been expressed as to the duty of an appellate tribunal in relation to a finding by a trial judge. There was universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness, but no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should be given to the judge's opinion. The statement of the proper function of an appellate court would be influenced by the extent to which the speaker's mind was directed to the one or the other of the two aspects of the problem. In a case like the present, where there was no dispute about any relevant specific fact or the credibility of witnesses, but the sole question was whether the proper inference from those facts was that the patent disclosed an inventive step, the appellate court should form an independent opinion, though it would attach importance to the trial judge's judgment.

The other noble and learned lords expressed agreement.

APPEARANCES: *Shelley*, Q.C., and *Whitford* (*Oscar Mason and Co.*); *Charles Russell*, Q.C., *Johnston*, Q.C., and *Tompkin* (*Sharpe, Pritchard & Co.*, for *Ryland, Martineau & Co.*, Birmingham).

[Reported by F. H. COWPER, Esq., Barrister-at-Law] **[2 W.L.R. 418**

PATENT: CLAIM TO APPORTIONMENT

Sterling Engineering Co., Ltd. *v.* Patchett

Viscount Simonds, Lord Porter, Lord Reid, Lord Tucker and Lord Somervell of Harrow. 20th January, 1955

Appeal from the Court of Appeal ((1953), 71 R.P.C. 61).

By s. 56 (2) of the Patents Act, 1949: "In proceedings before the court between an employer and a person who is or was at the material time his employee, or upon an application made to the comptroller under subs. (1) of this section, the court or comptroller may, unless satisfied that one or other of the parties is entitled, to the exclusion of the other, to the benefit of an invention made by the employee, by order provide for the apportionment between them of the benefit of the invention, and of any patent granted or to be granted in respect thereof, in such manner as the court or comptroller considers just." This was an appeal by the defendant company from an order of the Court of Appeal allowing an appeal from Danckwerts, J. The plaintiff (now the respondent) had been in the employment of the company as a production engineer. During that time, he made certain inventions and he now claimed a royalty on the selling price of articles in which they were used, alleging an understanding and agreement that he should be remunerated for them. The company denied the agreement and counterclaimed for a declaration that they were entitled to have his interest in the relevant patents, which stood in the joint names of the plaintiff and the company, transferred to them. The plaintiff put in a reply and defence to counter-claim. The action was disposed of by Roxburgh, J., but the counter-claim was left over for hearing. He dismissed the action. The counter-claim subsequently came on before Danckwerts, J. The defence to counter-claim was amended by pleading the understanding and agreement alleged in the statement of claim and by claiming that the benefit of the inventions be apportioned under s. 56 (2) of the Patents Act, 1949. Danckwerts, J., held that the plaintiff was not entitled to rely on the alleged understanding and agreement since this was *res judicata* by reason of the dismissal of the action. The Court of Appeal took a contrary view. The court further held that the alleged understanding was not sufficient to negative the consequence following from the fact that the plaintiff was the company's employee and that they were entitled to an assignment, but that it was sufficient to enable the court to exercise the power of apportionment under s. 56 (2).

VISCOUNT SIMONDS said that it was not necessary to decide the point of *res judicata* because the counter-claim must succeed, and the same considerations which secured its success were fatal to a claim under s. 56 (2). There was nothing in the case which would justify the court in holding that the ordinary rule governing the relation of master and servant was displaced. Further, s. 56 (2) had no application. The jurisdiction thereunder only arose if the court was not satisfied that one or other of the parties was entitled to the exclusion of the other to the benefit of an invention. The word "entitled" referred to legal right. The court must therefore determine the legal rights just as it must determine them in any other case and if the issue was, as it was here, whether one party was entitled to the exclusion of the other, it must decide that question "aye" or "no," and, having decided it in the affirmative, it was not for the court to say that it was not satisfied. The court, having held that the plaintiff had no beneficial interest in the patents, must declare itself satisfied that the company were entitled, to the exclusion of the plaintiff, and decline the jurisdiction conferred by s. 56 (2).

The other noble and learned lords concurred.

APPEARANCES: *Shelley*, Q.C., and *Aldous* (*Cosmo Cran and Co.*); *Wilberforce*, Q.C., and *Goulding* (*Gedge, Fiske & Co.*).

[Reported by F. H. COWPER, Esq., Barrister-at-Law] **[2 W.L.R. 424**

COURT OF APPEAL

DESERTED WIFE LEFT IN MATRIMONIAL HOME: PURCHASERS FOR VALUE WITH NOTICE

Jess B. Woodcock & Sons, Ltd. *v.* Hobbs

Denning, Birkett and Parker, L.JJ. 20th January, 1955

Appeal from Bow County Court.

The defendant, having been deserted by her husband, remained in occupation of the matrimonial home, the husband paying the rent. The house was situated at the entrance to a yard in which the husband carried on a road haulage business. Later the husband bought the premises and still permitted the wife to remain in occupation. When the road haulage industry was nationalised and the British Transport Commission compulsorily acquired the husband's business he, through his solicitors, informed the commission that the wife was acting as caretaker of the business and as such was living in the house rent free. His purpose, as found by the court, was to avoid paying the rent. When, some four years later, on the denationalisation of the industry, the Transport Commission sold what had been the husband's business to the plaintiffs, the commission passed on the same information to the purchasers as to the position of the wife. The wife was in fact not acting as caretaker, having no duties to perform. Shortly after the conveyance had been completed the plaintiffs gave notice to the wife to quit and when she claimed to remain as a deserted wife they brought the present proceedings in the county court for possession. The judge dismissed the action, holding that in the circumstances the plaintiffs must in law be held to have had notice of the wife's true position; the plaintiffs appealed.

DENNING, L.J., said that it was established that a husband, or his trustee in bankruptcy, could not turn a wife out of the matrimonial home, unless the court in its discretion ordered her out (*Bendall* v. *McWhirter* [1952] 2 Q.B. 466). Nor, if he sold the house to a friend or relative at a low price as part of a scheme to get the wife out, would the court make an order for possession (*Street* v. *Denham* [1954] 1 W.L.R. 624; *Ferris* v. *Weaven* [1952] 2 All E.R. 233; *Savage* v. *Hubbold* (*The Times*, 11th June, 1953)). The ground in those cases was not collusion, but the fact that the purchasers took with full knowledge of the facts, and so were in no better position than the husband. In the present case neither the Transport Commission nor the plaintiffs had knowledge that the defendant was a deserted wife. Nevertheless, they had notice of her true position, as they took with notice of her occupancy and could not have properly believed that she was a caretaker. The wife's right was not to stay on indefinitely, but until such time as the court in its discretion ordered her to go out. The judge below had thought that the discretion could not be exercised in an action for possession, but only in a separate application made expressly for the purpose; that view could not be sustained. Here the purchasers had bought in good faith, though they must be taken in law to have had notice of the wife's position. She had refused to pay a rent which would have turned her into a statutory tenant. There would be an order for possession in three months, which would give the wife time to apply to the courts for further maintenance to make up for the loss of her home.

BIRKETT and PARKER, L.JJ., agreed. Appeal allowed.

APPEARANCES: *H. Vester* (*Ernest W. Long & Co.*); *M. P. Picard* (*Trotter, Chapman & Whisker*, Epping.)

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 152**

RENT RESTRICTION: COTTAGE LET WITH LAND: RATEABLE VALUE OF LAND INCREASED: OLD OR NEW CONTROL

Davies *v.* Gilbert

Denning, Birkett and Parker, L.JJ. 20th January, 1955

Appeal from Bridgnorth County Court.

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides by s. 12 (2) (iii): "For the purposes of this Act, any land or premises let together with a house shall, if the rateable value of the land or premises let separately would be less than one quarter of the rateable value of the house, be treated as part of the house, but, subject to this provision, this Act shall not apply to a house let together with land other than the site of the house." The Rent and Mortgage Interest Restrictions Act, 1939, provides by s. 3 (3): "... for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920–1938, as amended by virtue of this section, any land or premises let together with a dwelling-house shall, unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent, be treated as part of the dwelling-house; but, save as aforesaid, the principal Acts shall not, by virtue of this section, apply to any dwelling-house let together with land other than the site of the dwelling-house." In 1937 the then owner of a cottage and 4½ acres of woodland let the whole to the defendant at a rent of 7s. 6d. per week. The cottage was rated at £4 and the woodland was not rated at all. In 1938 the defendant cleared the undergrowth on the woodland and started business as a caravan site proprietor. In 1953 the 4½ acres were rated at £9, the cottage being still rated at £4. In 1954 the then owner sold the property to the plaintiff, who gave the defendant notice to quit. The tenant claimed the protection of the Rent Acts. The county court judge made an order for possession. The defendant appealed.

DENNING, L.J., said that as in 1939 the rateable value of the land was less than a quarter of that of the cottage, the premises came under the old control of the Acts of 1920 to 1938. The land was now rated higher than the cottage: did that new rating take the premises out of the old control? That raised the question what was the proper time for the test of rateable value. The defendant had relied on s. 12 (6) of the Act of 1920; that section had often been invoked but never, it would seem, applied. The test of rateable value under the old control was to be determined when the landlord sought to enforce his rights; at that time the cottage was rated at £4 and the caravan site at £9, so the whole ceased to be within the Act, and the landlord was entitled to possession.

BIRKETT and PARKER, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *J. P. Widgery* (*Stafford Clark & Co.*, for *Weston, Fisher & Weston*, Kidderminster); *R. J. Toyn* (*Woolley and Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 160**

WILL: GIFT OF ANNUITY: WHETHER A CONTINUING CHARGE ON INCOME

***In re* Cameron, deceased; Currie *v.* Milligan**

Evershed, M.R., Jenkins and Hodson, L.JJ.

25th January, 1955

Appeal from Roxburgh, J. ([1954] 1 W.L.R. 1375; 98 SOL. J. 788).

A testator, A. Cameron, who died in 1929, by cl. 12 of his will dated 2nd June, 1927, directed his trustees to pay to his widow one-third of the income of his residuary trust fund and "if one-third of the income of the trust fund shall in any year during the life of my said wife amount to less than £6,500 per annum free of English income and super tax my trustees shall in respect of that year pay or cause to be paid to my said wife out of the income of the trust fund in addition to one-third of the income thereof such further sum as will give to her a net income for that year of £6,500 free of English income and super tax." By cl.13 the testator directed that "subject to the interest of my said wife in part of the income of the trust fund under the last preceding clause hereof" his trustees should hold the income of the trust fund on protective trusts for his son on his attaining the age of twenty-five years. Clauses 15 and 16 of the will contained directions to accumulate surplus income while the son was under twenty-five. The testator's estate was large, and until 1938 there was surplus income which was accumulated, but from 1938 onward, owing to high rates of taxation, the widow's annuity had not been paid in full. The son died in 1940 and the question was raised whether accumulations of income made during the life of the son and the income of such accumulations were liable to make good the past deficiency in the widow's annuity. Roxburgh, J., held that the widow had no power to resort to accumulations of income in past years or to the income of such accumulations. The widow appealed.

EVERSHED, M.R., having referred to *In re Coller's Deed Trusts* [1939] Ch. 277, said that cl. 12, on its true construction, only conferred a right upon the widow to resort in any year to the surplus income of that year to make up her annuity of £6,500. The interest which the testator gave to his son in income was inconsistent with the widow having a continuing charge on all income during her life.

JENKINS and HODSON, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *Charles Russell*, Q.C., and *Owen Swingland*; *W. A. Bagnall*; *P. S. A. Rossdale* (*H. A. Rose* with him) (*Johnson, Jecks & Landons*; *Lee, Bolton & Lee*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] **[1 W.L.R. 140**

CHANCERY DIVISION

FISHERY: RIVER BOARD WITHHOLDING GENERAL LICENCES TO FISH

Mills and Another *v.* Avon and Dorset River Board

Vaisey, J. 25th January, 1955

Adjourned summons.

The plaintiffs were the owners of two several fisheries on the Hampshire Avon within the defendants' area. For many years general licences to fish those fisheries had been issued, first under the Salmon Fishery Act, 1865, and later under s. 61 of the Salmon and Freshwater Fisheries Act, 1923, as modified, under s. 93 (2), by the Hampshire Rivers Fisheries Provisional Order, 1922. In 1953 the defendants decided not to issue general licences for 1954, on the ground that certain owners of fisheries within the defendants' area had commercialised their fishing, with the result that the issue of general licences caused the defendants substantial losses. The plaintiffs, and certain other owners within the defendants' area, had not commercialised their fishing, and by this summons they asked for a declaration that they were entitled as of right to the issue to one or both of them of a general licence.

VAISEY, J., said that the general and indiscriminate withholding of general licences for 1954 was unjustified. Section 61 of the Act of 1923 provided that a fishery board should grant

licences, on payment of such duties as they with the approval of the Minister might determine, to persons not disqualified. By s. 61, r. (*g*) : " Any person or association of persons entitled to an exclusive right of fishing for salmon or trout . . . may . . . obtain a general licence subject to such conditions as the fishery board and the licensee may agree or in default of agreement as may be determined by the Minister." By r. (*h*) : " There shall be paid for a general licence such sum as the fishery board [and the licensee] may from time to time agree with the approval of the Minister, having regard to the extent and productiveness of the fishing . . . " It appeared from rr. (*g*) and (*h*) that there was ample authority for the board, with the consent of the Minister, to fix appropriate conditions and fees in order to differentiate in a fair manner, and not in the indiscriminate manner of totally withdrawing general licences. Clause 17 of the Provisional Order of 1922 was in substantially the same terms, and made it clear that the appropriate charge for a general licence was a matter to be decided between the board and the fishery owners according to the circumstances of each case. There would be a declaration that, under the terms of the Act and of the order, the plaintiffs were entitled as of right to a general licence subject to such conditions as might be agreed or determined by the Minister without prejudice to the right of the board to withhold such general licence in the event of any nuisance or threatened misuse of the privileges conferred thereby. Order accordingly.

APPEARANCES : *Dingle Foot*, Q.C., and *J. Dean* (*R. Graham Page*, for *Nevill & Stuart*, Ringwood) ; *N. J. Skelhorn*, Q.C., and *Owen Thomas* (*R. Stock* with them) (*Vizard, Oldham, Crowder and Cash*, for *D. W. Treadgold*, Bournemouth).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [2 W.L.R. 413

COMPANY : WINDING UP : FORMER COLLIERY COMPANY : ADJUSTMENT OF RIGHTS AS BETWEEN SHAREHOLDERS : DATE FOR DISTRIBUTION OF ASSETS

***In re* Doncaster Amalgamated Collieries, Ltd.**

Vaisey, J. 2nd February, 1955

Originating summons.

Section 25 of the Coal Industry Nationalisation Act, 1946, directs that provision shall be made by regulations with regard to adjustments as between classes of debenture holders and shareholders of companies having assets transferred to the National Coal Board. Regulation 2 (5) of the regulations so made provides : " No adjustment proposal shall have effect for the purpose of these regulations unless notice thereof under para. (2) is served before the expiry of nine months from the date when the amount of the compensation to be made under the Act in respect of the transfer of the company's transferred interests, and in respect of any claim under s. 17 of the Act, is finally determined." Regulation 23 provides : " Any period or date specified in these regulations as the period within which, or the date by which, anything is to be done may, notwithstanding that the period has expired or the date has passed, being a period, be extended, or, being a date, be postponed : (*a*) in the cases mentioned in para. (5) of reg. 2 . . . by the Minister ; on such terms . . . as may seem just . . ." The liquidators of Doncaster Amalgamated Collieries, Ltd., whose colliery assets were on 1st January, 1947, transferred to the National Coal Board and which was in voluntary liquidation, being uncertain as to the date from which the period of nine months prescribed by reg. 2 (5) began to run, took out a summons to determine the question whether on the true construction of the regulations they ought to distribute the assets available for its contributories on the footing that the period of nine months referred to in reg. 2 (5) was to be calculated from : (*a*) The day whereon the value of those of the company's assets which by virtue of the Act of 1946 became vested in the National Coal Board, and which constituted five " compensation units ", was determined for the purposes of the said Act ; or (*b*) the day whereon the review of all determinations of the value of " compensation units " by the Yorkshire District Valuation Board which should be or had been submitted for review to the referees appointed for that purpose pursuant to s. 12 (5) of the Act and the regulations should be finally completed ; or (*c*) any and what other day.

VAISEY, J., said that the adjustment provisions in the Act meant that in certain events preference shareholders would receive something in excess of their normal entitlement in a winding up. The liquidators, who had something over £200,000 in hand, which they wished to distribute to the ordinary shareholders, had received no proposals for an adjustment scheme, and did not anticipate any. The preference shareholders contended that the moment of the final determination of the value of the company's assets was the date when the valuation of the compensation units by the local valuation board, submitted to the referees under s. 12 and the regulations, was finally determined. The contention of the ordinary shareholders was that the material date was that on which the company's assets vested in the National Coal Board. If the preference shareholders were right, the distribution would probably be delayed until the end of 1955, which was very unfortunate for the ordinary shareholders. Unfortunately, the language of the regulation was so plain as to indicate that the date of distribution must be postponed until nine months after the time when the tribunal adjudicating between the rival claims of companies in the Yorkshire area had made their decision. Regulation 23, unfortunately, authorised the Minister only to postpone, and not to anticipate a date, so that it must be declared that " finally determined " in reg. 2 (5) must be taken as referring to the date of the decision of the local referees, subject to the provision " unless the period is extended by the Minister under reg. 23." Declaration accordingly.

APPEARANCES : *Ralph Instone ; T. D. D. Divine ; P. J. Sykes* (*Linklaters & Paines*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 167

COMPANY : LIQUIDATOR NOMINATED BY RESOLUTION OF CREDITORS : MAJORITY REQUIRED

***In re* Caston Cushioning, Ltd.**

Roxburgh, J. 7th February, 1955

Petition.

A resolution passed at a meeting of creditors of a company, nominating a liquidator to act in the voluntary winding up of the company instead of the liquidator nominated by the company at an extraordinary general meeting, was passed by a majority of creditors in value but not in number. There was no other nomination by the creditors, and the chairman declared that the liquidator nominated by the company should be the liquidator, as the creditors' resolution was not passed by a majority in value and number. Subsequently a creditor of the company brought a petition for the compulsory winding up of the company. It was stated in the petition that the petitioner was not satisfied with the course which the voluntary winding up had taken and on further consideration he desired that the company should be wound up by the court. The petition was not opposed. Section 294 of the Companies Act, 1948, provides that if no person is nominated liquidator by the creditors in the voluntary winding up of a company : " the person, if any, nominated by the company shall be liquidator . . . ." Rule 134 of the Companies (Winding Up) Rules, 1949, provides : " At a meeting of creditors a resolution shall be deemed to be passed when a majority in number and value of the creditors present . . . have voted in favour of the resolution . . . ."

ROXBURGH, J., said that it was plain from r. 134 that the resolution was not passed, because it was not passed by a majority in number and value ; it was only passed by a majority in value which was a minority in number. It seemed to him that there was no real ambiguity about that rule, and if that rule applied the resolution was not duly passed. That seemed to be consistent with *In re Bloxwich Iron and Steel Company* [1894] W.N. 111. Surprising as it was to come to the conclusion, the liquidator nominated by the company had therefore been duly appointed liquidator. There was no question about his removal because he did not resist a compulsory order, and he would therefore be automatically removed by the making of a compulsory order. The petitioning creditor was entitled to his order in default of any opposition because the liquidator had not appeared to oppose on behalf of the company, but to protect his own interest. The petitioner's costs in the ordinary course would be ordered to be paid out of the assets. The liquidator had taken a reasonable course because of the adverse criticisms made against him in the petition. That paragraph should be struck out of the petition and the liquidator was entitled to the costs he had incurred in the voluntary winding up out of the assets of the company in the course of the liquidation. Winding-up order made.

APPEARANCES : *I. Edwards-Jones* (*Kingsley Napley & Co.*) ; *Ralph Instone* (*Middleton, Lewis & Co.*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] [1 W.L.R. 163

QUEEN'S BENCH DIVISION

FALL OF ROOF IN MINE: ABNORMAL EXPLOSION: BREACH OF STATUTORY DUTY

Jackson *v.* National Coal Board

Hallett, J. 29th November, 1954

Action tried at assizes.

The Coal Mines Act, 1911, provides by s. 49: "The roof and sides of every travelling road and working place shall be made secure, and a person shall not . . . travel on or work in any travelling road or working place which is not so made secure." By s. 102 (8): "The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach." A shot-firer employed by the defendants in their coal mine was killed by a fall of roof occasioned by an explosion of a most abnormal character. In a hessian bag, which was normally used for holding stemming materials, he was carrying cartridges and detonators, which by the Coal Mines (Explosives) Order, 1951, he ought to have carried in his powder canister and detonator case respectively. He put the bag at the foot of the coal face within easy reach of a hole which he was stemming and, when he fired a shot in the hole, either some material projected as a result of the shot struck the bag and caused an explosion, or the contents of the bag were set off by sympathetic action. The explosion displaced props supporting the roof, which collapsed and buried him. The widow brought an action alleging a breach of s. 49.

HALLETT, J., said that the duty under s. 49 was absolute. Two questions arose: first, whether the roof had been made secure; secondly, if it was not, and the defendants were in breach of s. 49, whether they were protected from liability by s. 102 (8). They contended that in the exceptional circumstances of the case the plaintiff had failed to prove that the roof had not been made secure; and, secondly, that no reasonably practicable system of support would make a roof secure against such an event. The decision most in point was one of his own in the unreported case of *Hayes* v. *National Coal Board*, where the same questions arose. Some men carrying an injured miner on a stretcher pushed aside a tub to make room; the tub fouled a pit-prop which caused a fall of roof which injured the plaintiff; it was held that there had been no failure to make the roof secure, and the judgment was based in part on the test of "foreseeability" arising in Factories Act cases. The conclusion on the first point in the present case was that, having regard to the abnormal nature of the event which caused the fall, no failure to make the roof secure had been established. On the second point, it would not be reasonably practicable to prop a roof to such a degree that it would remain undisplaced by such an explosion. Judgment for the defendants.

APPEARANCES: *G. R. Hinchcliffe*, Q.C., and *R. W. Payne* (*Raley & Pratt*, Barnsley); *G. Veale*, Q.C., and *A. B. Boyle* (*C. M. H. Glover*, Doncaster).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 132**

CONTRACT: SALE OF GOODS TO AUSTRALIAN BUYERS: LIABILITY OF ENGLISH CONFIRMING HOUSE FOR BUYERS' CANCELLATION

Rusholme & Bolton & Roberts Hadfield, Ltd. *v.* S. G. Read & Co. (London), Ltd.

Pearce, J. 20th December, 1954

Action tried at assizes.

Through their Australian representatives the plaintiffs received an indent for goods from an Australian company, terms being confirmation and payment by the defendants, a London confirming house. The exact indent was repeated in terms by the defendants to the plaintiffs, with the words "Purchased by (the defendants) holders of Purchase Tax No. Central 2/3793 of goods as stock intended for exportation." Towards the bottom of the document were words confirming the indent received by the Australian representatives of the plaintiffs, and a footnote indicated that any variation of the terms required written approval from the defendants. Before the delivery date the Australian company cancelled both orders and the plaintiffs were unable to obtain payment therefrom. The defendants refused to accept the goods and the plaintiffs brought an action against them for damages for breach of contract.

PEARCE, J., said that the transaction was that the Australian company arranged with the plaintiffs' Australian agents that they should buy certain goods subject to confirmation and payment by the defendants; and the defendants confirmed in a letter in which they purported to order the goods as principals and to become liable on the contract. The order was accepted by the plaintiffs, who proceeded to manufacture the goods. They would never have accepted the order without the intervention of an English confirming house. There was no authority deciding the position and liability of a confirming house, but the fact that a person was known to be an agent did not of itself prevent his incurring personal liability, and where he contracted on behalf of a foreign principal there was a presumption that he accepted such liability, and also when he signed in his own name without qualification. The defendants contended that the real contract was between the plaintiffs and the Australian company, and that the defendants, like a *del credere* agent, merely guaranteed the solvency of the buyer, so that at most they could be liable only if judgment was obtained against the Australian company. But the defendants' liability was not so limited; on the documents, the defendants were to assume the liability of a principal buyer as between themselves and the plaintiffs, and the document sued on was the true contract between the parties; it was intended to, and did, impose a liability on the defendants in respect of the performance of the contract. Judgment for the plaintiffs.

APPEARANCES: *J. D. Cantley*, Q.C., and *W. D. T. Hodgson* (*Knott & Castle*, Manchester); *R. H. Mais* (*H. A. Crowe & Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 146**

LEGAL AID: TAXATION OF COSTS: COST OF SHORTHAND NOTE NOT INCLUDED IN CERTIFICATE

Wallace *v.* Freeman Heating Co., Ltd., and Another

Pearson, J. 24th January, 1955

Summons adjourned into open court.

The Legal Aid and Advice Act, 1949, provides by s. 2 (2): "Where a person receives legal aid . . . (*a*) the expenses incurred in connection with the proceedings, so far as they would ordinarily be paid in the first instance by or on behalf of the solicitor acting for him, shall be so paid . . . ." The Legal Aid (General) Regulations, 1950, provide by reg. 2 (2): "Any document purporting to be a certificate issued in accordance with these regulations shall, unless the contrary is proved, be deemed to be a valid certificate issued to the person named therein." By reg. 8 (1): "The appropriate area committee may amend a certificate—(*a*) where it appears to the area committee that there has been some error or mistake in a certificate." By reg. 14 (3): "Where it appears to the assisted person's solicitor necessary . . . to take . . . any one or more of the following steps, namely— . . . (*b*) to bespeak any transcript of shorthand notes of any proceedings . . . he shall (unless the certificate provides for the act in question to be done) apply to the appropriate area committee for authority so to do, and no payment shall be allowed on taxation for any such step taken without their approval." The successful plaintiff in a running down action was granted a civil aid certificate for the purpose of appealing to the Court of Appeal on the question of damages. The certificate was in the usual form and contained no special authority for the incurring of any particular expenditure. The defendants entered a cross-appeal on the issue of liability. For the purposes of the appeal the plaintiff's solicitors bespoke a copy of the transcript of the judgment and of the evidence in the court of trial. On the hearing of the appeals the plaintiff succeeded in obtaining an increased award of damages which was subsequently reduced to a figure slightly above that awarded at the trial in view of the defendants' succeeding in establishing contributory negligence on the part of the plaintiff. On the taxation of the plaintiff's solicitors' bill of costs the amount of the shorthand writer's account was disallowed by the taxing master on the ground that the civil aid certificate granted to the plaintiff only authorised an appeal on the question of damages which did not necessitate the bespeaking of a transcript of the evidence. On the disallowance of the shorthand writer's account being reported to the local legal aid secretary, he confirmed that he intended his first certificate to cover the shorthand writer's account, and an amended certificate was granted pursuant to reg. 8 of the Legal Aid (General) Regulations, 1950, authorising the shorthand writer's account to be incurred, and this fact was

referred to by the plaintiff's solicitors in their objections to the taxation. The taxing master overruled the objections.

PEARSON, J., said that the taxing master's answers raised two questions: first, was specific authority from the area committee necessary for bespeaking a transcript or was the certificate authorising the appeal sufficient authority? Having regard to reg. 14 (3) (*b*), to the note to R.S.C., Ord. 66A, r. 4, and to the form of the certificate in question, he had concluded that a special certificate was necessary and rejected a contention that s. 2 (2) of the Act was sufficient authority. On the second question, raised by the retrospective authorisation, he had observed that the effect of such procedure would be to give the area committee power to overrule the taxation and override the regulation, and that the acceptance of retrospective authority would open the door wide to many abuses. The taxing master's answers were right and should be upheld. The certificate, on the face of it, plainly did not authorise the bespeaking of a transcript, and reg. 14 obviously meant that such a matter must be submitted to and decided by the area committee. That regulation also plainly showed that the approval of the committee must be given before, and not after, a transcript was ordered. It had been argued that the committee had later, pursuant to reg. 8, amended the certificate: if prior approval had in fact been given and omitted from the certificate in error, that might have been put right under reg. 8, but the proper inference on the facts was that no prior approval had been given. Appeal dismissed.

APPEARANCES: *R. J. Harvey* (*Wrentmore & Son*, for *Thos. John & Co.*, Cardiff); the defendants were not represented.

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 172**

PROBATE, DIVORCE AND ADMIRALTY DIVISION

SHIPPING: COLLISION: NUMBER OF CERTIFICATED OFFICERS: LIMITATION OF LIABILITY

Western Steamship Co., Ltd. *v.* N. V. Koninklijke Rotterdamsche Lloyd and Others

The "Empire Jamaica"

Willmer, J. 27th January, 1955

Action for limitation of liability.

The plaintiffs' vessel, the "Empire Jamaica," came into collision with the first defendants' vessel. The plaintiffs, while admitting liability, claimed to be entitled to limit their liability. At the time of the collision the officer in charge of the watch of the "Empire Jamaica" was uncertificated and the vessel to the knowledge of the plaintiffs was manned with an insufficient number of certificated officers, in contravention of s. 4 (3) (*c*) of the Hong Kong Merchant Shipping Ordinance No. 2 of 1949.

WILLMER, J., said that the question was whether the plaintiffs had satisfied him that the collision and consequent damage had happened without their fault or privity. That involved the question whether this breach on their part of the Hong Kong Ordinance had no causal connection with the collision. That it was *a* cause, in the sense of it being a *causa sine qua non*, there could be no doubt, since the officer in respect of whose negligent navigation the plaintiffs had already admitted their liability was an uncertificated officer. But that did not conclude the matter. The plaintiffs had given evidence that the officer, although uncertificated, was a perfectly competent man, with quite a sound knowledge of navigation, a long experience at sea, and a considerable experience of watch-keeping as an officer. That evidence had not been contradicted. In those circumstances it was argued that the mere fact of the officer of the watch not possessing a certificate did not by any means necessarily involve that that was a cause of the collision. The argument might have been pressed even further, because, even if the ordinance was strictly complied with, there could never be any guarantee that the officer in charge on the bridge at any given time would be a certificated officer. Neither the Hong Kong Ordinance nor our own Merchant Shipping Act laid it down that a certificated officer must always have charge of the bridge. Having regard to that evidence, it was impossible to say that there was any causal connection between the fact of his not having a certificate and his negligent navigation which led to this collision. This seemed to be the first case in which the question had been directly raised whether the non-provision of the requisite number of certificated officers was of itself enough to render an owner guilty of fault or privity in relation to a casualty subsequently occurring. In the absence of any authority directly in point, it was necessarily a question of fact in each case. On the facts of this case, he would decide that question in favour of the plaintiffs, who were entitled to the declaration sought. Claim allowed.

APPEARANCES: *K. S. Carpmael*, Q.C., and *J. B. Hewson* (*Hill, Dickinson & Co.*); *R. F. Hayward*, Q.C., and *Derek H. Hene* (*Waltons & Co.*).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] **[2 W.L.R. 435**

COURT OF CRIMINAL APPEAL

[PRACTICE NOTE]

CRIMINAL LAW: PREVIOUS CONVICTIONS: INFORMATION TO BE GIVEN BY POLICE

Lord Goddard, C.J., Cassels and Gorman, JJ.

31st January, 1955

LORD GODDARD, C.J., said that the judges of the Queen's Bench Division had considered the question as to the information and history of accused and convicted persons that should be given to the court, counsel and solicitors by police officers before and after conviction. They had resolved as follows: (1) Details of previous convictions must always be supplied by the police to the defending solicitor, or if no solicitor was instructed to defending counsel, on request. The judges were of opinion that there was no obligation on a police officer to satisfy himself that the prisoner had authorised a statement of previous convictions to be given as it was clearly within the ordinary authority of solicitor and counsel to obtain this information. In order that the defence might be properly conducted the prisoner's advisers must know whether they could safely put the prisoner's character in issue. (2) There was no need for police officers to supply a list of previous convictions to the court before conviction because the prisoner's previous convictions were always set out in the confidential calendar with which the judge was supplied by the governor of the gaol whose duty it was to supply it. The police would, of course, give any information to the governor that he might require to enable him to perform his duty. (3) A proof of evidence should be prepared by a police officer containing a factual statement of the previous convictions, date of birth if known, education and employment, the date of arrest, whether the prisoner had been on bail and, if previously convicted, the date of his last discharge from prison if known. It might also contain a short and concise statement as to the prisoner's domestic and family circumstances, his general reputation and associates, and, if it was to be said that he associated with bad characters, the officer giving evidence must be able to speak of this from his own knowledge. This proof might be given either with his brief or at the outset of the case to counsel for the prosecution and to no one else, as unless the accused was convicted it had no relevance. It need not be prepared in two parts. If the accused was convicted it was to be given to the court and to counsel for the defence, but it would be for counsel for the prosecution in the first place to decide how much of this he asked the officer to prove, while it would, of course, be open to the presiding judge to put any questions he might think fit. The statement should not be handed to the court or to defending counsel until the officer was sworn. It might by leave of the court be given to the shorthand writer, who might use it to check his note, but must only transcribe so much as was given in evidence.

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 139**

The annual general meeting of the NEWCASTLE UPON TYNE INCORPORATED LAW SOCIETY, being the 128th anniversary meeting, was held at the Law Library, Pilgrim Street, Newcastle upon Tyne, on 27th January. The president, Mr. R. J. Dickinson, was in the chair. In the course of his address the president pointed out that the society had now reached its highest membership, at 326. The following officers were elected for the ensuing year: president, Henry Cecil Ferens, M.A., LL.B.; vice-president, Douglas Elliott Braithwaite, T.D., B.A.; hon. treasurer, Stanley Grenville March, T.D.; hon. secretary, Thomas Milnes Harbottle, C.B.E., M.C.; and hon. librarian, Philip Standring Layne. In the evening the society's annual dinner was held at the Old Assembly Rooms, Newcastle upon Tyne, when 346 members and guests sat down to dinner. Amongst those present were Mr. Justice Holroyd Pearce, His Grace the Duke of Northumberland, the Rt. Rev. the Lord Bishop of Newcastle upon Tyne, three county court judges, and Mr. F. H. Jessop, the President of The Law Society. The toast of "The Bench" was proposed by the president, Mr. R. J. Dickinson, and replied to by Mr. Justice Holroyd Pearce. The toast of "The Guests" was proposed by Mr. J. L. R. Croft, T.D., and replied to by the President of The Law Society.

SURVEY OF THE WEEK

HOUSE OF LORDS

Progress of Bills

Read First Time :—

Cocos Islands Bill [H.C.] [8th February.

Colonial Development and Welfare Bill [H.C.] [8th February.

County Courts Bill [H.L.] [8th February.

To extend the jurisdiction of county courts and, in connection therewith, to make further provision for the despatch of business in county courts by increasing the number of judges and otherwise, and provide for appeals from county courts on questions of fact, and for purposes connected with the matters aforesaid.

Read Second Time :—

Food and Drugs (Scotland) Bill [H.L.] [8th February.

Read Third Time :—

New Towns Bill [H.C.] [8th February.

HOUSE OF COMMONS

A. Progress of Bills

Read First Time :—

Airports Licensing Bill [H.C.] [9th February.

To amend Licensing Regulations at Airports in Great Britain.

Children and Young Persons (Harmful Publications) Bill [H.C.] [10th February.

To prevent the dissemination of certain pictorial publications harmful to children and young persons.

Read Second Time :—

Bristol Corporation Bill [H.C.] [7th February.

Cheshunt Urban District Council Bill [H.C.] [7th February.

Crosby Corporation Bill [H.C.] [7th February.

London County Council (Loans) Bill [H.C.] [7th February.

Mersey Tunnel Bill [H.C.] [7th February.

Nuneaton Corporation Bill [H.C.] [7th February.

Sandown—Shanklin Urban District Council Bill [H.C.] [7th February.

Transport (Borrowing Powers) Bill [H.C.] [8th February.

In Committee :—

Army Bill [H.C.] [9th February.

B. Questions

Income Tax (Expenses Allowances)

Mr. H. Brooke said that it was not always practicable to arrange that the expenses allowances of directors and senior executives of firms should be dealt with by Schedule D inspectors for income tax purposes, so that they could be considered at the same time as the company accounts of the firms concerned. It was, however, the aim of the Board of Inland Revenue that important cases should, as far as possible, be dealt with by specially experienced officers. [4th February.

Breach of Promise Actions

The Attorney-General declined to consider amending the existing law so as to make it necessary in breach of promise actions to prove material damage. He recognised the force of the suggestion, but there did not at present appear to be sufficient evidence of a general demand for a change in the law. [7th February.

Morelle, Ltd. *v.* Waterworth

Asked whether he would now make over to Paddington Borough Council housing property at one time owned by Brady or Waters and now vested in the Crown by decision of the courts, the Attorney-General said that the question whether these properties had vested in the Crown was now before the Court of Appeal. [8th February.

Legal Aid (Costs)

The Attorney-General said that he would not regard as desirable the repeal of the provision whereby The Law Society could take costs from the damages recovered by an assisted person, as that would put such persons in a more favourable position than ordinary litigants, who, when deciding whether to take proceedings, had to balance the possible cost of litigation against the amount of damages which might be recovered. [8th February.

Damage by Aircraft

Mr. Boyd-Carpenter said that the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface had not yet been ratified. In the meanwhile, operators of aircraft flying over the United Kingdom were already liable in law for any damage that they caused, without proof of negligence. [9th February.

Obscene Publications

Major Lloyd-George said that he was examining the proposals of the Committee initiated by the Society of Authors on the law of obscene publications, but he was not at present able to make any statement about the possibility of legislation. [10th February.

Motoring Offences (Emission of Smoke)

Major Lloyd-George said that in 1954 one person had been proceeded against in the Metropolitan police district and eighteen cautions issued for the offence of avoidable emission of smoke from motor vehicles. [10th February.

STATUTORY INSTRUMENTS

Act of Sederunt (Applications to Sheriff under Housing (Repairs and Rents) (Scotland) Act, 1954), 1955. (S.I. 1955 No. 206 (S. 17).) 8d.

Berkshire and Reading Fire Services (Combination) Order, 1955. (S.I. 1955 No. 224.)

Bread (Amendment) Order, 1955. (S.I. 1955 No. 221.)

Button Manufacturing Wages Council (Great Britain) Wages Regulation Order, 1955. (S.I. 1955 No. 189.) 6d.

Consular Conventions (Income Tax) (French Republic) Order, 1955. (S.I. 1955 No. 159.)

Consular Conventions (Income Tax) (Kingdom of Greece) Order, 1955. (S.I. 1955 No. 160.)

Consular Conventions (Income Tax) (Kingdom of Norway) Order, 1955. (S.I. 1955 No. 156.)

Consular Conventions (Income Tax) (Kingdom of Sweden) Order, 1955. (S.I. 1955 No. 158.)

Consular Conventions (Income Tax) (United States of America) Order, 1955. (S.I. 1955 No. 157.)

Consular Conventions (Income Tax) (United States of Mexico) Order, 1955. (S.I. 1955 No. 161.)

County of Salop (Electoral Divisions) Order, 1955. (S.I. 1955 No. 223.) 5d.

District Registries Order in Council, 1955. (S.I. 1955 No. 164.) This Order, which comes into operation on 1st March, 1955, establishes a District Registry at Lancaster with a district coincident with the Lancaster County Court district.

Double Taxation Relief (Taxes on Income) (U.S.A.) Order, 1955. (S.I. 1955 No. 162.) 5d.

See *post*, p. 136.

Gloucester Water Order, 1955. (S.I. 1955 No. 209.)

Kirkcaldy Corporation (Thornton Borehole) Water Order, 1955. (S.I. 1955 No. 196 (S. 16).)

Merchandise Marks (Imported Goods) (No. 1) Order, 1955. (S.I. 1955 No. 163.)

Non-Contributory Old Age Pensions Amendment Regulations, 1955. (S.I. 1955 No. 199.)

Parliamentary Constituencies (Birmingham and North Warwickshire) Order, 1955. (S.I. 1955 No. 177.) 5d.

Parliamentary Constituencies (Bradford, Brighouse and Spenborough and Dewsbury) Order, 1955. (S.I. 1955 No. 180.) 5d.

Parliamentary Constituencies (Carmarthenshire) Order, 1955. (S.I. 1955 No. 184.)

Parliamentary Constituencies (Croydon) Order, 1955. (S.I. 1955 No. 174.)

Parliamentary Constituencies (Dudley and South Staffordshire) Order, 1955. (S.I. 1955 No. 171.)

Parliamentary Constituencies (Harrow) Order, 1955. (S.I. 1955 No. 167.)

Parliamentary Constituencies (Huddersfield, Colne Valley and Penistone) Order, 1955. (S.I. 1955 No. 179.)

Parliamentary Constituencies (Kingston-upon-Thames, Surbiton and Wimbledon) Order, 1955. (S.I. 1955 No. 175.)
Parliamentary Constituencies (Leeds) Order, 1955. (S.I. 1955 No. 182.) 5d.
Parliamentary Constituencies (Newcastle upon Tyne) Order, 1955. (S.I. 1955 No. 168.)
Parliamentary Constituencies (Newport and Monmouth) Order, 1955. (S.I. 1955 No. 186.)
Parliamentary Constituencies (Nottinghamshire) Order, 1955. (S.I. 1955 No. 169.) 5d.
Parliamentary Constituencies (Sheffield) Order, 1955. (S.I. 1955 No. 183.) 5d.
Parliamentary Constituencies (South-East Staffordshire) Order, 1955. (S.I. 1955 No. 170.)
Parliamentary Constituencies (Spelthorne, Feltham and Heston and Isleworth) Order, 1955. (S.I. 1955 No. 166.)
Parliamentary Constituencies (Stoke-on-Trent) Order, 1955. (S.I. 1955 No. 172.)
Parliamentary Constituencies (Sussex) Order, 1955. (S.I. 1955 No. 176.) 5d.
Parliamentary Constituencies (Swansea) Order, 1955. (S.I. 1955 No. 185.)
Parliamentary Constituencies (Wakefield and Hemsworth) Order, 1955. (S.I. 1955 No. 181.)
Parliamentary Constituencies (Wolverhampton) Order, 1955. (S.I. 1955 No. 173.)
Parliamentary Constituencies (Woolwich) Order, 1955. (S.I. 1955 No. 165.) 5d.
Parliamentary Constituencies (Yorkshire, East Riding) Order, 1955. (S.I. 1955 No. 178.) 5d.
Retail Bookselling and Stationery Trades Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1955. (S.I. 1955 No. 208.) 5d.
Retention of Cables under Highway (Ross and Cromarty) (No. 1) Order, 1955. (S.I. 1955 No. 197.)
Retention of Cables, Mains and Pipes under Highways (Carmarthenshire) (No. 1) Order, 1955. (S.I. 1955 No. 153.)
Retention of Cables, Mains and Pipes under Highways (Lancashire) (No. 1) Order, 1955. (S.I. 1955 No. 150.)
Retention of Cables, Mains and Pipes under Highways (Somersetshire) (No. 2) Order, 1955. (S.I. 1955 No. 152.) 5d.
Retention of Cables, Mains and Pipes under Highways (Somersetshire) (No. 3) Order, 1955. (S.I. 1955 No. 204.)
Retention of Mains under Highways (Lancashire) (No. 2) Order, 1955. (S.I. 1955 No. 151.)
Retention of Pipe under Highway (Bath) (No. 1) Order, 1955. (S.I. 1955 No. 148.)
Retention of Pipe under Highway (Somersetshire) (No. 1) Order, 1955. (S.I. 1955 No. 149.)
Royal East African Navy Order, 1955. (S.I. 1955 No. 188.)
Singapore Colony Order in Council, 1955. (S.I. 1955 No. 187.) 11d.
South of Scotland Electricity Board (Temporary Borrowings) Regulations, 1955. (S.I. 1955 No. 215 (S. 18).)
Stopping up of Highways (Kent) (No. 2) Order, 1955. (S.I. 1955 No. 200.)
Stopping up of Highways (London) (No. 5) Order, 1955. (S.I. 1955 No. 201.)
Stopping up of Highways (London) (No. 6) Order, 1955. (S.I. 1955 No. 203.)
Stopping up of Highways (London) (No. 7) Order, 1955. (S.I. 1955 No. 205.)
Stopping up of Highways (Staffordshire) (No. 1) Order, 1955. (S.I. 1955 No. 202.)
Sunderland (Amendment of Local Enactment) Order, 1954. (S.I. 1955 No. 190.)

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 102–103 Fetter Lane, E.C.4. The price in each case, unless otherwise stated, is 4d., post free.]

POINTS IN PRACTICE

Party Wall—Exposure to Weather after Demolition of Adjoining House—Whether Adjoining Owner Liable

Q. *A* owns the freehold of one house in a terrace of houses. The adjoining house, which is the last in the terrace, has recently been demolished. The owner of the demolished house has taken steps to support the wall separating his house from the house of *A*. This wall is now exposed to the weather and damp is penetrating *A's* house. The deeds do not show whether the wall is a party wall. Is the owner of the house adjoining *A's* house under an obligation to weatherproof the exposed wall?

A. It is not stated whether the house is within the Metropolitan Building Act, 1855. If it is, *Thompson* v. *Hill* (1870), L.R. 5 C.P. 564, may be of interest. See also *Bryer* v. *Willis* (1870), 23 L.T. 463. The circumstances imply that the wall before the act of demolition was a party wall (see *Cubitt* v. *Porter* (1828), 8 B. & C. 257, and *Watson* v. *Grey* (1880), 14 Ch. D. 192). This would make the maintenance of an action of trespass impossible by one part owner against the other, but there would, of course, be a remedy for negligence in "underpinning" (*Bradbee* v. *Christ's Hospital* (1842), 4 Man. & G. 714) or unreasonable delay in rebuilding part of the wall which had been knocked down. But the question does not state whether any part of the wall has been demolished. Possibly the whole wall is standing, and has been shored up, but is not weatherproof. If that is the situation, then any action would have to be founded in the fact of injury to an easement or in nuisance. We incline to doubt whether there could be any easement to keep out the weather. The protection afforded by the adjoining house when it stood appears to us to have been fortuitous. As to nuisance, certainly the condition of *A's* wall is the result of an act of the adjoining owner and the case could be put on the basis of actual damage to property, a stricter head of liability than mere interference with amenities (*St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H.L. Cas. 642, 650). But we nevertheless do not think it would be reasonable to require the demolisher to weatherproof the wall with a concrete seal, for instance. Here again a factor which we think must influence the court is that the protection from weather afforded to one house by another is purely accidental—it is not as if the adjoining owner had pulled down a structure expressly intended as a screen.

Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the "Points in Practice" Department, The Solicitors' Journal, 102-103 Fetter Lane, London, E.C.4.

They should be brief, typewritten in duplicate, and accompanied by the name and address of the sender on a separate sheet, together with a stamped addressed envelope. Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.

Merger—Purchase of Freehold—Position of Mortgagee

Q. I acted for mortgagees in the mortgage of the leasehold interest in certain property. The mortgagors are now proposing to purchase the freehold reversion and their solicitors suggest that it will be necessary for a new mortgage to be executed by their clients. No further advance is being made to the mortgagors to enable them to purchase the reversion. Although the mortgagors' solicitors state that the term of years will merge in the fee simple, it would seem to us that under the circumstances no merger can take place so long as the mortgage is in existence, owing to the intervening interest of the mortgagees. If my contention is correct, will it be necessary for the mortgagor to enter into a further mortgage?

A. We share the view that no merger would occur on the purchase by the lessee of the freehold reversion. The interest of the mortgagees is not, strictly, an intervening interest since their estate is only a sub-term created out of the leasehold interest. Nevertheless, we consider that merger would not take place owing to the duty of the mortgagor to prevent merger (*Re Fletcher* [1917] 1 Ch. 339; Emmet on Title, 13th ed., vol. II, p. 768). If it is decided that a new mortgage is preferable to relying upon the duty of the mortgagor and the intent of the transaction, the existing mortgage should be discharged in the usual way and an ordinary form of mortgage executed of the freehold interest, after the mortgagor has declared the leasehold interest merged. Such a declaration can conveniently be contained in the conveyance of the freehold to the mortgagor.

NOTES AND NEWS

Honours and Appointments

The Queen has been pleased to appoint Mr. NORMAN HARPER to be Recorder of the Borough of Doncaster with effect from 8th February.

Mr. STUART LUTTRELL PETER, town clerk of Launceston for twenty-eight years until he retired in 1953 to become Coronation Year mayor, has been made an Honorary Freeman of the borough.

Personal Notes

Mr. Ronald George Taylor, of Harpenden, completed fifty years in practice as a solicitor on 24th January, his seventy-second birthday.

Mr. Raymond Norman Wear Bishop, solicitor, of Bradford, was married on 5th February to Miss Anne Verina Robertshaw, of Bradford.

Mr. R. W. Fenton recently completed thirty years as Clerk to Barnoldswick Urban District Council.

Miscellaneous

The President of The Law Society, Mr. F. Hubert Jessop, gave a luncheon party on 10th February for the Norwegian Ambassador, the Master of the Rolls, Viscount Kemsley, Sir John Braithwaite, Mr. Rolf Christophersen, Mr. Leslie Peppiatt and Mr. Thomas G. Lund.

DOUBLE TAXATION: U.S.A.

The supplementary protocol to the double taxation convention with the United States of America was ratified on 19th January and has now been published as the schedule to an Order in Council numbered S.I. 1955 No. 162. The object of the amendment made by the protocol is to allow the convention to be extended to Colonial territories with modifications.

APPOINTMENT OF ARBITRATORS UNDER THE AGRICULTURAL HOLDINGS ACT, 1948

An announcement by the Ministry of Agriculture and Fisheries which was the subject of a paragraph at p. 50, *ante*, stated that an arbitrator under s. 8 of the above Act who was appointed after the date from which the revised rent was to take effect would have no jurisdiction to make an award. A statement of correction by the Ministry now points out that even if the arbitrator were appointed too late to make an award on the matter of rent he could nevertheless make an award as to costs.

The combined annual general meeting of members of the Area Committee and of members of all Local Committees within the No. 5 (South Wales) Legal Aid Area, will be held at the Seabank Hotel, Porthcawl, on Friday, 22nd April, at 12 noon.

Wills and Bequests

Mr. T. H. Terry, retired solicitor, of Hampstead, left £23,480 net.

Mr. Viotti Emanuel George Churcher, solicitor, of Gosport, left £97,808 (£97,983 net).

Mr. H. W. M. Aldridge, solicitor, of Christchurch, left £59,764 (£58,217 net).

OBITUARY

MR. J. L. BROOKS

Mr. James Lane Brooks, solicitor, of Odiham and Basingstoke, died recently, aged 93. In 1895 he succeeded his father as clerk to the Odiham magistrates, an office held by his family from 1818–1946. Mr. Brooks held the office until 1932. He was clerk to the Basingstoke divisional magistrates for many years. He was admitted in 1884.

MR. A. C. BRADBURY

Mr. Alfred Charles Bradbury, solicitor, of Herne Bay, died recently, aged 46. He had been town clerk of Goole and deputy town clerk of Nuneaton. He resigned as clerk to Herne Bay Council six months ago owing to ill health. He was admitted in 1933.

MR. J. A. ELIOTT

Mr. John Allen Eliott, solicitor, of Plymouth, died on 14th February, aged 81. He was admitted in 1896, and was a former Mayor of Liskeard.

MR. J. HARRISON

Mr. John Harrison, retired solicitor, of Manchester, died on 5th February, aged 81. He was admitted in 1913.

MR. G. H. J. ROBERTON

Mr. George Henry James Roberton, solicitor, of Grosvenor Square, London, W.1, and Bury St. Edmunds, died on 14th February, aged 45. He was admitted in 1932 and had been town clerk of Bury St. Edmunds.

MR. H. B. WHITE, M.C.

Mr. Howard Belmont White, M.C., former town clerk of Carmarthen, died on 22nd January, aged 71. He succeeded his father in the town clerkship in 1930 and retired in 1948. At the time of his death he was clerk to the Carmarthen Borough, Carmarthen County and Whitland magisterial courts. He was admitted in 1906.

SOCIETIES

The annual dinner of PLYMOUTH LAW STUDENTS' SOCIETY was held on 27th January.

The annual dinner of the NORTH STAFFORDSHIRE AND DISTRICT LAW STUDENTS' SOCIETY was held at Newcastle on 13th January.

The annual dinner of the ROYAL INSTITUTION OF CHARTERED SURVEYORS will be held at Grosvenor House, Park Lane, London, W.1, on Tuesday, 1st March, at 7 p.m. for 7.30 p.m.

The SOLICITORS' ARTICLED CLERKS' SOCIETY announce the following programme. March: Thursday, 3rd, Scottish Reels: 6 p.m. at The Law Society's Hall. Members 1s., guests 1s. 6d.; refreshments. Thursday, 10th, Social Evening (musical): 6 p.m. at The Law Society's Hall. Members of S.A.C.S. will be playing their favourite records—boogie to Bach; refreshments. Ballet (Margot Fonteyn dancing at Covent Garden): full details from Ann Churchill (ACOrn 0183 or HOLborn 6821, day only). Tuesday, 22nd, Rugger Match against Chartered Accountants' Students' Society of London: to be played at Esher R.F.C., kick-off 2.30 p.m. Train from Waterloo to Hersham. Turn right out of station; ground about 200 yards on left; tea available for visitors after the match. April: Friday, 1st, All Fools' Day Dance: 7 p.m.–11 p.m. at The Law Society's Hall. Informal Dress. Tickets 2s. 6d. each.

The second annual dinner of the CHESTERFIELD AND NORTH-EAST DERBYSHIRE LAW SOCIETY was held recently at the Portland Hotel, Chesterfield.

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